

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/1.
INTRODUCTION/(1) IN GENERAL/401. Scope of the title.

COMMONS (VOLUME 13 (2009) 5TH EDITION)

1. INTRODUCTION

(1) IN GENERAL

401. Scope of the title.

This title is concerned with the law relating to commons, but not, except incidentally, with the law relating to town and village greens¹. The following are discussed in this title:

- 1 (1) the meanings of 'common' and 'rights of common'²;
- 2 (2) common lands³ and the inclosure of commons⁴;
- 3 (3) the role of central and local administration⁵;
- 4 (4) the different types of rights of common⁶ and their creation⁷, alienation and acquisition (including compulsory acquisition)⁸, extinguishment and suspension⁹;
- 5 (5) the registration of common land, both under the Commons Registration Act 1965¹⁰ and, in pilot areas in England, under the Commons Act 2006¹¹;
- 6 (6) the respective rights and duties of the owner of the soil and the commoners¹²;
- 7 (7) certain rights of access over commons¹³; and
- 8 (8) the regulation of commons and works on commons¹⁴.

The law relating to town and village greens, and the law relating to access land under the Countryside and Rights of Way Act 2000, are discussed in detail elsewhere in this work¹⁵. It should, however, be noted that town and village greens may also be subject to rights of common¹⁶ and that any land shown as registered common land on a map in conclusive form issued by the appropriate countryside body for the purposes of Part I of the 2000 Act¹⁷ may be access land for the purposes of that Act¹⁸.

1 For the purposes of the Commons Registration Act 1965, 'town or village green' means land which has been allotted by or under any Act for the exercise or recreation of the inhabitants of any locality or on which the inhabitants of any locality have a customary right to indulge in lawful sports and pastimes or which falls within ss 22(1A): s 22(1) (definition amended by the Countryside and Rights of Way Act 2000 s 98(1), (2)). Land falls within the Commons Registration Act 1965 s 22(1A) if it is land on which for not less than 20 years a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged in lawful sports and pastimes as of right, and (a) either continue to do so; or (b) have ceased to do so for not more than such period as may be prescribed, or determined in accordance with prescribed provisions: s 22(1A) (added by the Countryside and Rights of Way Act 2000 s 98(1), (3)). The Commons Registration Act 1965 s 22(1), (1A) is prospectively repealed by the Commons Act 2006 Sch 6 Pt 1, as from a day to be appointed under s 56(1); at the date at which this volume states the law, no such day had been appointed.

As to land which may be registered in England and Wales as a town or village green under the Commons Act 2006 see s 15; and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 541.

2 See PARAS 405-432.

3 See PARAS 408-417.

4 See PARAS 418-422.

- 5 See PARA 423 et seq.
- 6 See PARAS 433-466.
- 7 See PARA 467 et seq.
- 8 See PARA 474 et seq.
- 9 See PARA 493 et seq.
- 10 See PARA 510 et seq.
- 11 See PARA 521 et seq.
- 12 See PARA 556 et seq.
- 13 See PARA 580 et seq.
- 14 See PARA 586 et seq.
- 15 See **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 578 et seq.
- 16 See the Commons Registration Act 1965 s 1(1)(b); and PARA 508; the Commons Act 2006 s 2(2)(b); and PARA 526.
- 17 le for the purposes of the Countryside and Rights of Way Act 2000 Pt I (ss 1-46): see PARA 580; and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 578 et seq.
- 18 See the Countryside and Rights of Way Act 2000 s 1(1)(b); PARAS 402, 580; and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 580.

UPDATE

401 Scope of the title

NOTE 1--See *R (on the application of Oxfordshire and Buckinghamshire Mental Health NHS Foundation Trust) v Oxfordshire CC*[2010] EWHC 530 (Admin), [2010] All ER (D) 249 (Mar).

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/1. INTRODUCTION/(1) IN GENERAL/402. The importance of rights of common.

402. The importance of rights of common.

The most significant aspect of rights of common¹ in practice is now that land subject to such rights may be accessible to the public for recreational purposes, both as access land under the Countryside and Rights of Way Act 2000² and under other specific public and local enactments³.

Rights of common of pasture⁴ are also an essential part of running many hill farms and a few lowland farms which would not be viable without them. There may be a conflict between the exercise of these rights and the exercise of public rights of access, since too much public access may disturb the cattle or sheep, or in some places the ponies, grazing on common land. Another problem encountered in practice is that there may be insufficient grazing for all requirements. An initial registration of rights may have been excessive but the existence of the right cannot now be challenged⁵, or the owner of the common may have other farms and have registered rights for himself or for his agricultural tenants⁶. The extent to which the rights of commoners can oust any right of the owner to graze his own cattle is not entirely clear⁷.

1 As to the meaning of 'right of common' see PARA 405; and as to the classification and description of rights of common see PARA 431 et seq.

2 See the Countryside and Rights of Way Act 2000 s 1(1)(b); PARAS 401, 580; and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 580.

3 See PARA 580 et seq.

4 As to rights of common of pasture see PARA 433 et seq.

5 See PARA 403.

6 See PARAS 438, 495.

7 See PARA 557.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/1. INTRODUCTION/(1) IN GENERAL/403. The requirement of registration.

403. The requirement of registration.

Since the coming into operation of the Commons Registration Act 1965, all land¹ in England and Wales which is common land² or a town or village green³, and all rights of common⁴ over such land, must be registered, either under that Act⁵, in the register of title kept under the Land Registration Act 2002⁶ or under the Commons Act 2006⁷. If not registered, rights of common are not exercisable⁸. It follows that the existence and nature of rights of common is determined by the state of the register. In this respect there may be a distinction between land and rights, as follows:

- 9 (1) the status of land registered as common land is finally determined by the register and extrinsic evidence is not available to rebut it⁹; consequently if land was finally registered when it ought not to have been its status cannot be challenged except under the transitional provisions of the Commons Act 2006¹⁰;
- 10 (2) if land was common land at the time of the coming into operation of the Commons Registration Act 1965 but was not registered under that Act then, except in limited circumstances under the transitional provisions of the Commons Act 2006¹¹ it is too late to do so and its status as common land has been lost¹²;
- 11 (3) the effect of the statutory wording as to rights of common being unenforceable if they were not registered by 1970¹³ was to extinguish them¹⁴ whether or not the land was registered under the Commons Registration Act 1965;
- 12 (4) if rights were registered it appears they must conclusively be held to exist and it is too late to challenge their existence¹⁵;
- 13 (5) the state of the register is now conclusive as to the maximum extent of registered rights, at least in the context of quantification of rights of pasture¹⁶; but it is not clear if this applies:
- 1
 1. (a) as to whether any figure other than the maximum should be substituted for the registered number of stock; or
 2. (b) to the scope of rights other than rights of pasture such as turbary and estovers¹⁷; or
 3. (c) to the mode of exercise¹⁸, such as the dates between which rights of pasture over Lammas land¹⁹ can be exercised²⁰;
- 2
 - 14 consequently evidence as to the origin of rights, for example as existing prior to legal memory or acquired by prescription, statute or custom²¹, and whether capable of being acquired by a corporate entity, and as to the mode of exercise, may still be relevant²².

The Commons Act 2006 states that the register is conclusive as to the status of land²³ and that it is subject to a right of common²⁴ and also as to whether the right of common is attached to land²⁵, but impliedly leaves open the extent of the right of common and expressly leaves open the existence of any constraints²⁶. Accordingly it is possible that a challenge to the extent and nature of a registered right can be mounted on the basis that the registration was excessive or that there were constraints on it at the time of registration. The amount and terms of exercise may depend on the origin of the right. This title therefore sets out the issues relevant to the origin of rights as that may be relevant to their terms. It should, however, be noted that, even if the right did not exist before registration in the form registered, if the dominant owner has in

fact exercised the right it may be possible to claim a prescriptive right in respect of the period between the date of registration and the date on which the provision of the Commons Act 2006 prohibiting the creation of new rights of common by prescription²⁷ came, or comes, into force in relation to the land²⁸. In such instances the rules on prescription may still apply²⁹.

1 'Land' includes land covered with water: see the Commons Registration Act 1965 s 22(1); the Commons Act 2006 s 61(1).

2 As to the meaning of 'common land' for these purposes see PARA 407.

3 As to the meaning of 'town or village green' see PARA 401 note 1. See further **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 532 et seq.

4 As to the meaning of 'rights of common' for registration purposes see PARA 405.

5 As to registration under the Commons Registration Act 1965 see PARA 508 et seq. See also *McLaren v Kubiak* [2007] EWHC 1065 (Ch), [2007] All ER (D) 191 (May). Certain land is excepted: see the Commons Registration Act 1965 s 11; and PARA 509. The initial registration period expired on 31 July 1970: see PARA 508. As to the creation and registration of new rights see PARA 467.

6 Certain rights not registrable under the Commons Registration Act 1965 may be registered in the register of title under the Land Registration Act 2002: see the Commons Registration Act 1965 s 1(2)(b); and PARA 508. It is not entirely clear to which rights s 1(2)(b) now refers. The Land Registration Act 2002 s 27(2)(d) (prospectively amended by the Commons Act 2006 Sch 5 para 8(1), (2), as from a day to be appointed under s 56(1)), excludes the express grant or reservation of an interest capable of being registered under the Commons Registration Act 1965 or the Commons Act 2006 Pt 1 (ss 1-25) (not fully in force) from the requirement of registration under the 2002 Act; and the Land Registration Act 2002 s 33(d) (prospectively amended by the Commons Act 2006 Sch 5 para 8(1), (3), as from a day to be appointed under s 56(1)), provides that no notice may be entered on the register of title in respect of such an interest (see PARA 543 note 17). See also the Commons Act 2006 s 3(7); and PARA 527. As to the register of title see **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 810 et seq.

7 As to registration under the Commons Act 2006 see PARA 521 et seq. At the date at which this title states the law, with the exception of: (1) s 4 (commons registration authorities: see PARA 507), s 5 (land to which Pt 1 applies: see PARAS 411, 424 note 6), s 15 (registration of greens: see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 541) and s 24 (applications: see PARA 521), which came into force on 6 April 2007 in relation to England and on 6 September 2007 for certain purposes in relation to Wales; (2) s 9 (severance of rights: see PARA 498) which is deemed to have come into force on 28 June 2005: see s 9(7)); and (3) ss 16, 17 (deregistration and exchange: see PARA 545 et seq), which came into force in relation to England on 1 October 2007, the provisions of Pt 1 (registration) were fully in force only in relation to certain pilot areas in England with effect from 1 October 2008: see the Commons Act 2006 (Commencement No 4 and Savings) (England) Order 2008, SI 2008/1960, art 2. For transitional provisions and savings see art 3. As to the pilot areas see PARA 467 text and notes 29-30.

8 See the Commons Registration Act 1965 s 1(2) (amended by the Land Registration Act 2002 Sch 11 para 7(1), (2); repealed in relation to the pilot areas in England (see note 7) by virtue of SI 2008/1960; otherwise prospectively repealed by the Commons Act 2006 Sch 6 Pt 1). See also *Re Tillmire Common, Heslington* [1982] 2 All ER 615 (jurisdiction of the Chancery Division of the High Court over disputes under the Commons Registration Act 1965).

Any new right of common created in the pilot areas in England does not operate at law until registered: see the Commons Act 2006 s 6(5); and PARA 467.

9 See the Commons Registration Act 1965 s 10; *President and Scholars of Corpus Christi College, Oxford v Gloucestershire County Council* [1983] QB 360, [1982] 3 All ER 995, CA; and PARA 508. Any challenge to the status of registered land ought to have been made while registrations were provisional and determined by a hearing before a Commons Commissioner: see PARA 508.

10 See the Commons Act 2006 Sch 2 (not fully in force); and PARA 535 et seq.

11 See the Commons Act 2006 Sch 2 para 2 (not fully in force): see PARA 535.

12 As to the effect of non-registration see *Oxfordshire County Council v Oxford City Council* [2006] UKHL 25 at [18], [2006] 2 AC 674 at [18], [2006] 4 All ER 817 at [18] per Lord Hoffmann (a case on town and village greens).

13 See note 8.

14 *Central Electricity Generating Board v Clwyd County Council* [1976] 1 All ER 251, [1976] 1 WLR 151; and see PARA 508.

15 See the Commons Registration Act 1965 s 10; the Commons Act 2006 s 18 (not fully in force); and PARAS 508, 529. However, the existence of such rights is not totally beyond challenge both in relation to freeholders of adjacent farms and also in relation to farms belonging to the owner of the common (whether in his occupation or that of agricultural tenants): see PARAS 438, 495.

16 See the Commons Registration Act 1965 s 15; *Bettison v Langton* [2001] UKHL 24, [2002] 1 AC 27, [2001] 3 All ER 417; and PARA 435. The specific decision in *Bettison v Langton* [2001] UKHL 24, [2002] 1 AC 27, [2001] 3 All ER 417 (on severability of quantified rights, relying in part on decisions back to the seventeenth century) has been reversed by the Commons Act 2006 s 9 (see PARA 498) but that does not affect the general principle.

17 See PARA 497.

18 In *Hall v Moore* [2009] EWCA Civ 201, [2009] All ER (D) 235 (Mar) the right was exercisable one year in three.

19 As to Lammas land see PARA 414.

20 The Commons Act 2006 s 18(5) (not fully in force) (see PARA 529) indicates that where land is subject to a right of common it is subject to the registered right as affected by a constraint even if the constraint does not appear in the register. The meaning of this is obscure but it may be interpreted for instance as saying that a constraint as to the time of exercise, as on Lammas lands, will apply even if not mentioned on the register.

21 As to custom, however, see *Hall v Moore* [2009] EWCA Civ 201 at [19], [2009] All ER (D) 235 (Mar) at [19] where the court considered all rights of common to lie in grant.

22 Although it appears that if a right is registered it must be conclusively held to exist in some form even if the registration was initially in error, the Commons Registration Act 1965 s 10 (see PARA 508) may need to be read in the light of the words 'no more' in s 15 (see PARA 435) which suggests it might be less. In *Bettison v Langton* [2001] UKHL 24, [2002] 1 AC 27, [2001] 3 All ER 417 counsel argued that the effect of the Commons Registration Act 1965 s 15 was to place a cap on the number of beasts which remained levant and couchant. The House of Lords rejected that argument and then assumed that the number of beasts was fixed but did not consider the point further in any detail.

23 See the Commons Act 2006 s 18(1) (not fully in force); and PARA 529.

24 See the Commons Act 2006 s 18(2) (not fully in force); and PARA 529.

25 See the Commons Act 2006 s 18(3) (not fully in force); and PARA 529.

26 See the Commons Act 2006 s 18(5) (not fully in force); and PARA 529.

27 I.e. the Commons Act 2006 s 6(1) (not fully in force): see PARA 467.

28 At the date at which this volume states the law, the Commons Act 2006 s 6 was in force only in relation to the pilot areas in England: see note 7.

29 As to prescription see PARA 470 et seq.

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INTRODUCTION/(1) IN GENERAL/404. Methods by which rights of common may be created.

404. Methods by which rights of common may be created.

The majority of rights of common are of ancient origin and were thus registrable under the Commons Registration Act 1965 before the expiry of the registration period on 31 July 1970¹. In exceptional cases, however a right of common may have arisen since that date if it was created:

- 15 (1) by express grant²;
- 16 (2) by implied grant³;
- 17 (3) by prescription⁴; or
- 18 (4) under an exchange of land, for example on a compulsory purchase order⁵.

Under the Commons Act 2006, the creation of new rights of common is further restricted and it is no longer possible to create rights by prescription⁶. In the pilot areas in England⁷, and in England and Wales generally once that Act is fully in force, new rights of common can only arise either by registration or express grant under that Act⁸ or on exchange of land⁹.

1 As to registration under the Commons Registration Act 1965 see PARA 508 et seq.

2 See PARA 469.

3 Implied grants may have often occurred where a farm and adjoining manorial wastes were owned by the same person and on a sale of the farm, rights were implied under the Law of Property Act 1925 s 62(1) (see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 236): see eg *Owen v Blathwayt* [2002] EWHC 2231 (Ch), [2003] 1 P & CR 444, [2002] All ER (D) 01 (Nov). The sale in that case took place in 1954 but such a sale after 1970 could create freehold rights where a former tenant had had grazing rights in common with other tenants of the owner of the 'common'. In practice where land was used by several tenants of a common estate landlord it would be known as a 'common' and in many, perhaps most, cases the land and rights over the land were registered under the Commons Registration Act 1965, sometimes by the tenant, sometimes by the landlord. In strict law this was incorrect but many such land and rights registrations either were unchallenged and became final or the Commons Commissioner let them pass and the land remains on the register and has the rights attached.

4 See PARA 470 et seq.

5 See PARA 479 et seq.

6 See PARA 467.

7 As to the pilot areas in England see PARA 467 text and notes 29-30.

8 See the Commons Act 2006 s 6(1); and PARA 467.

9 See the Commons Act 2006 ss 16, 17; and PARA 545 et seq.

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(2) DEFINITIONS

405. Meaning of 'right of common'.

The term 'common' has a number of meanings in English law; in this context it has relevance as to two aspects of that term. One is that a right of common is a right 'in common with' the owner of the soil and usually with other persons having profits of a similar nature (as in tenancy in common) as contrasted with a right in severalty. The second is that it is, in the context of this title, a common law right enforceable in the courts of common law as contrasted with customary rights or 'commonable' rights in one of the senses of that word¹ which were once enforceable in the manorial (customary) court. The popular view that it is common in a third sense of being land available for the community is historically mistaken although no doubt that has contributed to the application of the public right to roam under the Countryside and Rights of Way Act 2000 to all registered common land².

A right of common has been defined as a right, which one or more persons may have, to take or use some portion of that which another person's soil naturally produces³. Such part of that produce as the commoners do not lawfully take belongs to the owner of the soil⁴. The right is in the nature of a profit à prendre, and so must be distinguished from an easement, which, although a right over another person's land, confers no right to participation in the produce of that land⁵.

Both the Commons Registration Act 1965 and the Commons Act 2006 define 'right of common' as including cattlegates or beastgates (by whatever name known) and rights of sole or several vesture or herbage or of sole or several pasture, but excluding rights held for a term of years or from year to year⁶.

1 See PARA 407.

2 See PARA 580.

3 Cooke's Inclosure Acts (4th Edn) 5. For other definitions, see Elton on Commons 2; Woolrych on Rights of Commons (2nd Edn) 13; Bract 222; Britton 143; Fleta 254.

4 See PARA 556.

5 See **CUSTOM AND USAGE; EASEMENTS AND PROFITS A PRENDRE**. See also *White v Taylor (No 2)* [1969] 1 Ch 160 at 177, [1968] 1 All ER 1015 at 1023 (grazing rights). A right of common, however, will include all easements 'reasonably necessary for the reasonable enjoyment of the principal or primary right': *White v Taylor (No 2)* [1969] 1 Ch 160 at 196, [1968] 1 All ER 1015 at 1035 (placing of water troughs on a common). Although the Commons Act 2006 s 6(1) (not fully in force) prevents the creation of new rights of common by prescription (see PARA 467) it may still be possible to acquire by prescription new easements for the benefit of an existing right of common. An easement could therefore be acquired by prescription to place artificial feed on a common. At the date at which this volume states the law, s 6(1) was in force only in relation to certain pilot areas in England. As to the pilot areas in England see PARA 467 text and notes 29-30.

6 Commons Registration Act 1965 s 22(1); Commons Act 2006 s 61(1). As to cattlegates or beastgates see PARA 417; and as to sole or several vesture, herbage and pasture see PARAS 452-456. Prima facie, therefore, the definition of rights of common in the Commons Registration Act 1965 and the Commons Act 2006 includes rights which are not strictly rights of common within the previously accepted definition of the term, as graziers are sometimes owners of the soil itself: see PARA 417.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/1. INTRODUCTION/(2) DEFINITIONS/406. Meaning of 'common'.

406. Meaning of 'common'.

The term 'common' in the old texts and reports usually refers to rights of common which are exercisable over land rather than to the place on which those rights are exercised, whereas at the present time, unless accompanied by some reference to a particular kind of right of common such as common of pasture¹ or common of piscary², it usually denotes the land where rights of common are exercised. This will most often be open and uncultivated ground over which owners and occupiers of land in the vicinity (known as commoners) have certain rights, although they are not the owners of such ground³.

In older legislation the term 'common' may be defined by reference to the Inclosure Acts⁴.

1 See PARA 433 et seq.

2 See PARAS 461-464.

3 See *A-G v Hanmer* (1858) 27 LJ Ch 837 at 841 per Watson B. See also PARA 408 et seq. The term does not, of itself, include commonable lands: *Grand Union Canal Co v Ashby* (1861) 6 H & N 394. As to commonable lands, as distinguished from commons, see PARAS 407, 414-417.

4 As to the Inclosure Acts see PARA 419 note 2.

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407. Common and commonable lands.

The lands subject to rights of common have traditionally been divided into 'common lands', meaning uncultivated wastes, to which no severalty rights attach, and 'commonable lands' which are held in severalty during a portion of the year, but which become commonable after the severalty crop has been removed, and in many cases during the whole of the year in which they lie fallow¹. Following from this distinction it was said that common lands as a rule were waste of a manor but commonable lands were not, the ownership of the soil being in the severalty owners. However, the term 'commonable', while now obsolete for most practical purposes², has been used in different contexts with different meanings³. These include:

- 19 (1) land which is not subject to legal rights of common but to practices under which there is mutual forbearance⁴;
- 20 (2) rights of former copyholders on the waste since the freehold both of the copyhold and of the waste was vested in the lord and therefore the copyholder's grazing rights were customary not common law rights⁵;
- 21 (3) Lammas land and similar arrangements including some stinted land⁶;
- 22 (4) the expression 'commonable animals' can be used to describe animals which can lawfully be put on a common;
- 23 (5) some writers occasionally use the word incorrectly as a synonym for 'common'.

Furthermore, common land need not necessarily be waste since full rights of common can subsist over cultivated land and over village greens⁷. It is estimated that the common lands of England and Wales comprise some 550,000 hectares⁸.

The Commons Registration Act 1965, which makes provision for the registration of common land⁹, defines 'common land' as meaning:

- 24 (a) land¹⁰ subject to rights of common¹¹ whether those rights are exercisable at all times or only during limited periods; and
- 25 (b) waste land of a manor not subject to rights of common¹²,

but as not including a town or village green¹³ or any land which forms part of a highway¹⁴.

The Commons Act 2006, which will replace the 1965 Act once it is fully in force¹⁵, does not contain an equivalent general definition¹⁶.

1 As to the various kinds of commonable lands see PARAS 414-417. Commonable lands were part of the ancient open field system of farming which was probably general in England until the dissolution of the monasteries in the sixteenth century. The system gradually died out with the agricultural improvements of the eighteenth century, and during that and the following centuries the open fields were gradually inclosed under the various Inclosure Acts and apportioned among the severalty owners in consolidated holdings, so that at the present day they have practically ceased to exist (but see note 2). As to inclosure see PARA 418 et seq. In the context of inclosure land is several if it is (in effect) private property. In the past there was a distinction between on the one hand a close (several) and on the other open fields and waste (common or commonable), which were liable to be inclosed under the Inclosure Act 1845 s 11 (see PARA 419). Commonable lands of one sort or another may still exist in remote parts of the country, and rights may still be claimed over lands which were formerly commonable. Such rights now require registration: see PARA 403. As to the nature, origin and history of the open field system see the *Report of the Royal Commission on Common Land 1955-1958* (Cmnd 462) para 121 et seq, App II.

Often common rights subsist over the whole area of a waste but there may be a number of different owners of the soil in land which has historically been regarded as a single common or which has become registered under a single CL number. This can arise from many different causes such as partition of the lands of an ancient manor or sale of part of the waste (eg to public bodies).

2 For the modern law, either the land was registered, in which case it is conclusively presumed to be common and any registered rights conclusively accepted, or it was not, in which case the rights have (save in very exceptional circumstances) been lost: see PARA 403; for an exception with regard to lot meadows see PARA 415.

The open field system is still in use in Laxton, Nottinghamshire. There are still unfenced strips on the Isle of Portland but these are only used for grazing so the arable aspect does not arise. In *Hall v Moore* [2009] EWCA Civ 201, [2009] All ER (D) 235 (Mar), which concerned common land in Worcestershire, the grazing rights were exercisable one year in three; this may derive from the ancient system of three year rotation of some open fields.

3 See Gadsden *The Law of Commons* (1988) p 18.

4 These derive from the open field system where the holder in severalty of one or more strips could inclose against the others. The consequence was to extinguish the grazing rights of holders of other strips to graze the inclosed land and therefore at the same time to deprive the incloser of grazing rights over the lands of the others. Some open fields were however subject to true rights of common in which case such unilateral inclosure was not possible. These may be rights of shack: see PARA 416.

5 If the copyhold was enfranchised by agreement the former copyholder was often granted similar rights in fee simple which therefore became rights of common; if the copyhold was enfranchised by statute such fee simple rights were included: see the Copyhold Act 1894 s 22 (repealed); the Law of Property Act 1922 s 128, Sch 12(4) (repealed).

6 See PARA 417.

7 See the Commons Act 2006 s 3(3), (4); and PARA 527.

8 See the *Report of the Stakeholder Working Group on Agricultural Use and Management of Common Land* (April 2003; PB 8285), App A. Around 80% of the commons in England and Wales are privately owned, and approximately 1,900 have no known owner: App A.

9 As to registration see further PARA 506 et seq.

10 As to the meaning of 'land' for registration purposes see PARA 403 note 1.

11 Ie as defined in the Commons Registration Act 1965: see PARA 405.

12 Land may still be waste of a manor and registrable as common land although not being used as such, if it could easily revert: see *Re Yateley Common, Hampshire, Arnold v Dodd* [1977] 1 All ER 505, [1977] 1 WLR 840 (land being used as an aerodrome). Land which was formerly waste land of a manor was held to be registrable although no longer owned by the lord of the manor in *Re Yateley Common* [1977] 1 All ER 505, [1977] 1 WLR 840 (obiter) and in *Re Chewton Common, Christchurch, Borough of Christchurch v Milligan* [1977] 3 All ER 509, [1977] 1 WLR 1242; but not in *Re Box Hill Common, Box Parish Council v Lacy* [1980] Ch 109, [1979] 1 All ER 113, CA; *Re Britford Common* [1977] 1 All ER 532, [1977] 1 WLR 39. See now, however, *Hampshire County Council v Milburn* [1991] 1 AC 325, [1990] 2 All ER 257, HL; and *Lewis v Mid Glamorgan County Council* [1995] 1 All ER 760, [1995] 1 WLR 313, HL ('waste land of a manor' includes waste land both belonging and formerly belonging to the manor, so that such land does not cease to be registrable where the ownership of the lordship of the manor is severed from the ownership of the waste land).

Following the judgment in *Re Box Hill Common, Box Parish Council v Lacy* [1980] Ch 109, [1979] 1 All ER 113, CA, that waste land of the manor must still be in the ownership of the lord of the manor, many provisional registrations of common land were cancelled by the Commons Commissioner solely on those grounds, or were withdrawn by the applicant for registration in anticipation of cancellation: see the Explanatory Notes to the Commons Act 2006 para 120. Many of those provisional registrations were out of time or ineligible for appeal by the time of the decision in *Hampshire County Council v Milburn* [1991] 1 AC 325, [1990] 2 All ER 257, HL. The Commons Act 2006 Sch 2 para 4 (not fully in force) now provides a mechanism for registering the affected land as common land: see PARA 536.

13 As to the meaning of 'town or village green' for registration purposes see PARA 401 note 1. See further **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 532.

14 Commons Registration Act 1965 s 22(1). As to common land forming part of the highway see *Crown Estate Comrs v Dorset County Council* [1990] Ch 297, [1990] 1 All ER 19. As to the acquisition of land intended to form part of the highway see PARAS 481-482.

15 See PARA 506.

16 The reason is that the Commons Registration Act 1965 was concerned with what was to be registered and that therefore had to be defined, while the Commons Act 2006 took the existing registers for granted and land can only be added to the register in accordance with the Act. As to the meaning of 'land registered as common land' see the Commons Act 2006 s 61(2)(a); and PARA 424 note 7; and as to the meaning of 'common land' for the purposes of s 44 (works on common land) see s 44(4); and PARA 613 note 23.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/1. INTRODUCTION/(3) COMMON LANDS/(i) Manorial Waste, including Woodlands/408. Manorial waste.

(3) COMMON LANDS

(i) Manorial Waste, including Woodlands

408. Manorial waste.

The most usual species of common land is the manorial waste. Traditionally the lord of the manor was owner of the soil and entitled to all sporting rights and other rights of ownership in and over it, including the minerals, subject only to the rights of the commoners, and to such other rights as he or his predecessors had granted, or might be presumed to have granted, when such rights have been enjoyed for a period sufficient to establish a title by prescription, or on the supposition of a lost grant¹. The effect of many sales of titles² has, however, been that many commons are not owned by the lord of the manor as the traditional family may sell the title and retain the land, or vice versa, or may sell both separately.

Common lands may be subject to any of the rights of common³ and it follows that such rights can be exercised only in such parts of the waste as supply the particular product⁴.

1 'Common land', for the purposes of the Commons Registration Act 1965, includes manorial waste not subject to rights of common: see PARA 407.

2 See eg *Hampshire County Council v Milburn*[1991] 1 AC 325, [1990] 2 All ER 257, HL.

3 See PARA 432.

4 See PARA 459 et seq.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/1. INTRODUCTION/(3) COMMON LANDS/(i) Manorial Waste, including Woodlands/409. Woodlands.

409. Woodlands.

Woodlands do not differ materially from ordinary wastes, except that they alone bear the burden of the common of estovers¹, and that there is often a right, the measure of which is determined by usage, of shutting out the commoner's² stock for some reasonable time after felling, to secure the preservation of the young trees. There is also the right of feeding swine on beech mast or acorns, which is known as pannage or pawning³.

Various statutes have been passed from time to time restricting the rights of pasturage in woodlands for the encouragement of the growth of timber⁴.

1 See PARAS 432, 459-460.

2 As to commoners see PARA 406.

3 Pannage or pawning is exercisable either by the persons having rights of common of pasture or by agistment. See further Manwood's Forest Laws (5th Edn) 228, where the author quotes s 8 of the Forest Charter (9 Hen 3 (1224), confirmed by 25 Edw 1 (Forest Charter) (1297)). The latter statute has been repealed and the forest law abrogated, except as to the appointment and functions of verderers, by the Wild Creatures and Forest Laws Act 1971 (see s 1(2), (4), Schedule), but no existing right of pannage originating in the forest law is to be affected by the abrogation of that law or by the repeal of any enactment giving or confirming that right: see s 1(5). As to agistment see PARA 436 text and notes 4-5; and **ANIMALS** vol 2 (2008) PARAS 721-722. Where pannage exists as a right it is only to take the mast or acorns which have fallen, and does not entitle the owner of the right to interfere with the owner of the land in the proper management of his woods or to complain of his lopping or cutting down the trees: *Chilton v London Corpn* (1878) 7 ChD 562.

4 See eg the New Forest Act 1949 s 12, which provides for the suspension of rights of common where land in the New Forest is inclosed by the Forestry Commissioners for the purpose of growing timber; and **FORESTRY** vol 52 (2009) PARA 6. As to the use of the terms 'inclose', 'inclosure' etc see PARA 418 note 2; and as to inclosure generally see PARA 418 et seq.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/1. INTRODUCTION/(3) COMMON LANDS/(i) Manorial Waste, including Woodlands/410. Seaside waste.

410. Seaside waste.

In wastes abutting on the seashore¹, the owner of the soil is entitled to all land down to the line of the median high-water mark between spring and neap tides². Land which has been added by accretion takes the character of the land to which it has been added and is subject to the same customs and rights as affect such land³. Anything in the nature of soil blown or lodged upon land (for example, sand blown and drifted from the seashore) becomes part of the land⁴.

In practice, rights of common over foreshore are rare⁵.

1 The word 'waste', in a grant by letters patent is a sufficient description of the soil between high- and low-water mark: *A-G v Hanmer* (1858) 22 JP 543, 27 LJ Ch 837.

2 As to the upper limit of foreshore see *A-G v Chambers* (1854) 4 De GM & G 206, 23 LJ Ch 662. See further **CROWN PROPERTY** vol 12(1) (Reissue) PARA 242 et seq.

3 *Mercer v Denne* [1904] 2 Ch 534; affd [1905] 2 Ch 538, CA. Cf *Baxendale v Instow Parish Council* [1982] Ch 14, [1981] 2 All ER 620 (description of foreshore in conveyance to individual precluded claim to increased foreshore).

4 As to accretions generally see **BOUNDARIES** vol 4(1) (2002 Reissue) PARA 926; **WATER AND WATERWAYS** vol 100 (2009) PARA 39.

5 In *G & K Ladenbau (UK) Ltd v Crawley & de Reya* [1978] 1 All ER 682, [1978] 1 WLR 266, the land subject to erroneous registration was, however, part of a larger area of foreshore registered as common land. See also *Baxendale v Instow Parish Council* [1982] Ch 14, [1981] 2 All ER 620, where an unsuccessful attempt was made to register foreshore as waste of the manor.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/1. INTRODUCTION/(3) COMMON LANDS/(ii) Forests/411. Reservation of commoners' rights.

(ii) Forests

411. Reservation of commoners' rights.

Common land may also be land which is, or formerly was, part of the royal forests¹. When, by virtue of their prerogative, the medieval monarchs set apart wide tracts of country to form their forests, they expressly reserved to all who had common within the territory their prescriptive rights of herbage and other articles of common user not inconsistent with the new purpose for which the land was then set apart².

1 A 'forest' is not necessarily woodland; the term connotes a stretch of land to which the forest law formerly applied. The forest law, except in so far as it relates to the appointment and functions of verderers, has been abrogated by the Wild Creatures and Forest Laws Act 1971 s 1(2), but except as provided by s 1(3) (as to which see PARA 412) no existing right of common or pannage originating in the forest law is affected by such abrogation or by the repeal of any enactment giving or confirming that right: s 1(5). As to the meaning of 'pannage' see PARA 409.

The registration provisions of the Commons Registration Act 1965 do not apply to the New Forest or to Epping Forest, and are not to be taken to apply to the Forest of Dean: s 11(1) (repealed, in relation to the pilot areas in England, by virtue of SI 2008/1960; prospectively repealed in relation to the remaining areas of England and Wales by the Commons Act 2006 Sch 6 Pt 1, as from a day to be appointed under s 56(1)). Nor do the registration provisions of the Commons Act 2006 (ie Pt 1 (ss 1-25) (not fully in force): see PARA 521 et seq) apply to the New Forest or Epping Forest, and they are not to be taken to apply to the Forest of Dean: s 5(2), (3). If any question arises under Pt 1 whether any land is part of the forests mentioned in s 5 it is to be referred to and decided by the appropriate national authority: s 5(4). 'Appropriate national authority' is defined as meaning the Secretary of State, in relation to England, and the National Assembly for Wales, in relation to Wales: see s 61(1). However, the functions of the appropriate national authority in Wales under the Commons Act 2006 are now exercised by the Welsh Ministers: see PARA 423. The New Forest is regulated by the New Forest Acts 1877 to 1970 and Epping Forest by the Epping Forest Act 1878: see **FORESTRY** vol 52 (2009) PARA 5 et seq. Open land in the Forest of Dean is owned by the Crown, which asserts that the land is not subject to rights of common: see the Explanatory Notes to the Commons Act 2006 para 50. The Forest of Dartmoor (more correctly described as a 'chase' as it is held by the Duke of Cornwall not the Queen and was disafforested by King John) is thus subject to the Commons Registration Act 1965 and the Commons Act 2006 (although the latter is not fully in force) and also to the Dartmoor Commons Act 1985. Dartmoor is all registered common land subject to Venville rights and other common rights.

2 See eg 25 Edw 1 (Forest Charter) (1297) (repealed). 'Herbage' means the natural vegetation of any land as a distinct species of property; hence 'a liberty that a man hath to feed his catell in another man's ground, as in the forest' (Cowell, 1607): Oxford English Dictionary.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/1. INTRODUCTION/(3) COMMON LANDS/(ii) Forests/412. Special limitations of rights of forest common.

412. Special limitations of rights of forest common.

A right of common of pasture in a forest, as in the case of a similar right over an ordinary waste, may be either appendant or appurtenant¹, but within a forest the right may generally only be exercised in respect of horses and cattle², and the land in respect of which the right accrues must be within the forest; if this land is disafforested, the right of common within the forest is gone³. In some forests there were formerly periods of the year, known as the fence month⁴ and the winter heyning⁵, in which rights of common could not be exercised, but, since the abrogation of the forest law⁶, any right of common originating in that law is to be free of those restrictions or any payment in place of them⁷. Apart from the abolition of the fence month and winter heyning, no existing right of common originating in the forest law is to be affected by the abrogation of that law or by the repeal of any enactment giving or confirming that right⁸.

1 See PARA 431.

2 See *Webb's Habeas Corpus Case* (1616) 3 Bulst 213; *Leicester Forest Case* (1607) Cro Jac 155. In some forests sheep can be turned out by special prescription, eg Exmoor: see 55 Geo 3 c 138 (1815). That Act was repealed by the Wild Creatures and Forest Laws Act 1971 s 1(4), Schedule, but rights of common and pannage were specifically preserved: see s 1(5). None of the cases refers to prescriptive rights to pasture goats, swine or geese but if an immemorial usage can be shown to admit these animals to pasture there seems no reason to doubt that it would be upheld; this view is disputed, however, in *Elton on Commons* 10, but *Webb's Habeas Corpus Case* (1616) 3 Bulst 213, which is cited as an authority, refers only to sheep.

3 33 Edw 1 (Ordinance of the Forest) (1305) (repealed).

4 I.e. a period of 30 days at the end of June and beginning of July, the fawning season for deer.

5 I.e. the winter close time when pasture was scanty and reserved for deer. In the Forest of Dean it was from 11 November to 23 April: Dean Forest Act 1667 (repealed).

6 See the Wild Creatures and Forest Laws Act 1971 s 1(2).

7 Wild Creatures and Forest Laws Act 1971 s 1(3). This provision is not to affect the suspension or exclusion of any such right for the time being effected by or under any enactment or any limitations or restrictions for the time being imposed by or under any enactment on the exercise of any such right: s 1(3).

8 Wild Creatures and Forest Laws Act 1971 s 1(5).

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/1. INTRODUCTION/(3) COMMON LANDS/(ii) Forests/413. Presumption of incorporation of inhabitants.

413. Presumption of incorporation of inhabitants.

Although the royal forests were very numerous, nearly all have now been disafforested or are in the hands of private owners¹. The previous existence of a royal forest has, however, been treated as a ground for presuming an incorporation by a Crown grant of inhabitants and other fluctuating bodies who would otherwise have been incapable of taking by grant².

1 Under the Delimitation of Forests Act 1640 s 6, provision was made that the tenants, owners and occupiers of lands which should be excluded from the forest bounds when returned and certified should use and enjoy all such common and other profits and easements within the forests as anciently or accustomably they had used and enjoyed. That Act has been repealed by the Wild Creatures and Forest Laws Act 1971 s 1(4), Schedule, but existing rights of common are not affected: see s 1(5). See also PARA 412.

2 Eg *Willingale v Maitland* (1866) LR 3 Eq 103; *Chilton v London Corpn* (1878) 7 ChD 735; and see PARA 472 note 12. Where inhabitants are so entitled, they must be lawful inhabitants, ie inhabitants of houses lawfully erected and not liable to be pulled down as encroachments: *Chilton v London Corpn* (1878) 7 ChD 735 at 744 per Jessel MR; and cf *Hough v Clark and Hall* (1907) 23 TLR 682 (where evidence of acts done by persons claiming to do them as ratepayers was held not to support a claim for inhabitants).

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/1. INTRODUCTION/(3) COMMON LANDS/(iii) Commonable Lands/414. Lammas lands.

(iii) Commonable Lands

414. Lammas lands.

An important class of commonable lands¹ were Lammas lands². These were open arable and meadow lands held in severalty during a portion of the year but which, from Lammas Day³ after the severalty crop or hay had been removed, were commonable not only to the parties who had the severalty right⁴ but also to some other classes of commoners⁵.

The commoners upon Lammas lands were sometimes a class of inhabitants, such as the freemen of the neighbouring town⁶, or even the householders⁷, sometimes the inhabitants of the parish⁸, and perhaps more generally the owners and occupiers of ancient tenements within the parish, frequently designated as tofts⁹. There is an infinite variety in the classes of commoners over these Lammas lands and also in the periods during which they are entitled to exercise their various rights¹⁰.

In view of the requirement of registration¹¹ it is doubtful if Lammas lands now have a special status. In practice most Lammas lands are now pasture and not arable.

1 As to commonable lands generally see PARA 407.

2 These are so called because Lammas Day (1 August), or old Lammas Day (12 August), was the usual day on which they were thrown open. The difference in these dates is due to the eleven days under the Calendar (New Style) Act 1750: see **TIME** vol 97 (2010) PARA 302. They usually remained open until the following Lady Day (25 March). See further the *Report of the Royal Commission on Common Land 1955-1958* (Cmnd 462) para 127, App III paras 10, 14, and App VI Glossary, where Lammas lands are also referred to as 'half-year lands'.

3 See note 2.

4 I.e. unlike shack lands which were only open to those with severalty rights: see PARA 416.

5 Lammas lands are referred to in the Tithe Act 1839 s 13 (repealed), as large tracts of land in the occupation of certain persons during a portion of the year only and at other portions of the year in the occupation of other persons. See also *Baylis v Tyssen-Amhurst* (1877) 6 ChD 500 at 507 per Jessel MR. 'Common land', for the purposes of the Commons Registration Act 1965, includes land subject to rights of common, whether those rights are exercisable at all times or only during limited periods: see s 22(1); and PARA 407.

6 See *Staples v Mellor* (1679) 2 Lev 246; *Hinks v Clerk* (1679) 2 Lev 252; *Cox v Glue* (1848) 5 CB 533; *Re Norwich Town Close Estate Charity* (1888) 40 ChD 298, CA; *Johnson v Barnes* (1873) LR 8 CP 527, Ex Ch.

7 See *Hardy v Hollyday* (1765) quoted by Buller J in *Grimstead v Marlowe* (1792) 4 Term Rep 717.

8 *Grimstead v Marlowe* (1792) 4 Term Rep 717.

9 Cooke's Inclosure Acts (4th Edn) 48.

10 See *Baylis v Tyssen-Amhurst* (1877) 6 ChD 500 at 507-508 per Jessel MR; and the *Report of the Royal Commission on Common Land 1955-1958* (Cmnd 462) paras 127, 128.

11 See PARAS 403, 506 et seq. Under the Commons Registration Act 1965 s 15, a claim to grazing rights must quantify the number of animals claimed: see PARA 435.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/1. INTRODUCTION/(3) COMMON LANDS/(iii) Commonable Lands/415. Shifting severalties and lot meadows.

415. Shifting severalties and lot meadows.

This class of commonable lands¹ is not only subject to extensive variations in the character of the persons by whom and the times at which the rights of common over them are exercisable, but also varies extensively in the way in which the lands are held by the severalty owners. In many instances the severalty holding varies from year to year, or in the case of arable lands not annually, but periodically according to the rotation of the crops. In large open fields this was frequently the custom; and there were also the old lot meadows, in which the several portions were undivided, but were marked off by boundary stones or other marks, and the owners of different portions drew lots for the choice each year². The modern interpretation of such land is unclear. Lot meadows may be regarded as a movable freehold³ but the whole land may be held under a trust of land with the lot holders as beneficiaries or the rights may be rights of common like beastgates and therefore registrable.

The feature common to all Lammas and commonable lands, whether there are shifting severalties or permanent severalties, is that they become commonable as soon as the crops are removed. In view of the requirement of registration⁴, however, it is doubtful if such lands now have a special status. In practice most such lands are now pasture and not arable.

1 As to commonable lands generally see PARA 407.

2 See Co Litt 4a and 48b.

3 See *Baxendale v Instow Parish Council* [1982] Ch 14 at [20]-[21], [1981] 2 All ER 620 at 625 per Megarry V-C.

4 See PARAS 403, 506 et seq. Under the Commons Registration Act 1965 s 15, a claim to grazing rights must quantify the number of animals claimed: see PARA 435.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/1. INTRODUCTION/(3) COMMON LANDS/(iii) Commonable Lands/416. Shack.

416. Shack.

Another class of commonable lands¹ is shack land², which is land over which cattle are allowed to go at shack (that is to go at large to pasture). Such land was open arable or meadow land held in severalty during a portion of the year until the crop or hay had been removed and then becoming commonable to all the parties having severalty rights, but to no others³. In this respect may be said to lie the difference between shack lands and Lammas lands, which were commonable by others besides the severalty owners⁴.

Common of shack was said to have been originally in the nature of common of vicinage, and to have arisen from the division of fields into small parcels without inclosure⁵ and the consequent inconvenience, and in some cases impossibility, of each owner of these small parcels keeping his cattle on his own land⁶; but whether the original nature has been retained, or whether by the custom of the locality it has been altered into the nature of a common appendant or appurtenant, is a question to be determined by the custom and usage of every town or place⁷. Where common of pasture by reason of vicinage exists one town or manor may inclose its waste against the other⁸.

In view of the requirement of registration⁹, it is doubtful if such lands now have a special status. In practice most such lands are now pasture and not arable.

1 As to commonable lands generally see PARA 407.

2 Shack land, like Lammas land (see PARA 414), is sometimes called half-year land. 'Shack' means grain shaken or fallen from the ear and available for the feeding of stock after the harvest; see the *Report of the Royal Commission on Common Land 1955-1958* (Cmnd 462) App VI Glossary. As to commonable lands generally see PARA 407.

3 See Cooke's Inclosure Acts (4th Edn) 50; *Corbet's Case* (1585) 7 Co Rep 5a. Shack lands are mainly to be found in Norfolk: see *Corbet's Case* (1585) 7 Co Rep 5a.

4 See PARA 414.

5 *Corbet's Case* (1585) 7 Co Rep 5a. As to common of vicinage see PARAS 448-451. As to the use of the terms 'inclose', 'inclosure' etc see PARA 418 note 2; and as to inclosure generally see PARA 418 et seq.

6 *Cheesman v Hardham* (1818) 1 B & Ald 706 at 711 per Bayley J.

7 *Corbet's Case* (1585) 7 Co Rep 5a.

8 See further PARA 450.

9 See PARAS 403, 506 et seq. Under the Commons Registration Act 1965 s 15, a claim to grazing rights must quantify the number of animals claimed: see PARA 435.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/1. INTRODUCTION/(3) COMMON LANDS/(iii) Commonable Lands/417. Gated or stinted pastures.

417. Gated or stinted pastures.

Gated or stinted pastures are types of common or commonable lands¹ which prevail largely in the north of England where the rights over them are known by a number of different names, such as cattlegate, beastgate, pasturegate². In some cases the ownership of the soil remains in the lord of the manor or his successor³ subject to the right of several pasture upon it by the cattlegate owners⁴; in other cases the land is vested in the cattlegate owners⁵. The existence of cattlegates as incorporeal and corporeal hereditaments has been recognised by the legislature⁶.

Whatever their nature, cattlegates appear to have been always for a number of beasts certain, with equivalents according to the nature of the stock used⁷, to be capable of separate demise or alienation and to have been capable of being held as ordinary freeholds or of a manor as freehold or, prior to enfranchisement, as customary freehold or copyhold tenements⁸.

The definitions of 'right of common' in the Commons Registration Act 1965 and the Commons Act 2006 expressly include cattlegates or beastgates, by whatever name known⁹. The same rules thus apply to them as apply to other rights.

Of a somewhat similar character to cattlegates are the sheep heaves of the north of England, which are small plots of pasture, often in the middle of a waste, the soil of which may or may not belong to the lord of the manor or his successor, but the pasture of which is private property and is leased and sold as such¹⁰. Sheep heaves are generally owned by one person and therefore, strictly speaking, are not rights of common¹¹. They probably owe their origin to grants made in early times to persons who performed duties of watch and ward necessitated by the state of continual border warfare. Now that the duties have ceased, the rights come down evidenced only by their immemorial enjoyment, and are held, and well held, by prescription¹².

There is also another form of stinted pasture which is principally of historical interest. Under the Inclosure Act 1845, after the confirmation of a provisional order of inclosure¹³, the whole or part of the land could be converted into a regulated pasture, of which the soil (subject to any reservations of mines, minerals etc to the owner of the soil) was to belong¹⁴ to the owners of the stints as tenants in common in the proportions in which they were rated for the expenses of management, such expenses being in a ratio corresponding with the extent to which the owners were entitled to the original rights of common which were extinguished by the inclosure¹⁵. The creation of these regulated pastures was practically superseded by statutory regulation¹⁶, although there seems no reason to doubt that any stinted rights arising under this system may be demised or transferred in the same way as other rights of common which are certain and defined.

1 As to commonable lands generally see PARA 407.

2 'Cattlegate' is the most common term to express the right; but 'beastgate' in Suffolk (*Mellington v Goodtitle* (1738) Andr 106), 'cowgrasses' or 'beastgrasses' (*Rigg v Earl of Lonsdale* (1857) 1 H & N 923, Ex Ch), 'pasture gates' (*Doe d Haxby v Preston* (1847) 5 Dow & L 7) and 'cow-leaze' (in Epping Forest) are practically synonymous terms, as are the terms 'gated' and 'stinted'. The term 'stint' denotes the number of and the kind of animals a holder of rights of common is entitled to put on a common (see the *Report of the Royal Commission on Common Land 1955-1958* (Cmnd 462) App VI Glossary); it was sometimes limited by the extent, and sometimes by the yearly value, of each tenement (see *Williams on Commons* 156). Cf common sans nombre; see PARA 441 note 2. They are not strictly rights of common, as the cattlegate owners are almost invariably entitled to the exclusive right to the pasturage, but it is convenient to deal with them here. As to a sole or several pasture see further PARA 455.

3 See eg *Brackenbank Lodge Ltd v Peart* [1996] NPC 124, HL (ownership of soil of unenclosed part of moor remained with lord of manor and his successors notwithstanding a private Inclosure Act of 1799 (39 Geo III Cap 69) which purported to transfer ownership to stinholders).

4 *Rigg v Earl of Lonsdale* (1857) 1 H & N 923, Ex Ch.

5 See *R v Whixley Inhabitants* (1786) 1 Term Rep 137; *Barnes v Peterson* (1736) 2 Stra 1063; *Mellington v Goodtitle* (1738) Andr 106. See also the *Report of the Royal Commission on Common Land 1955-1958* (Cmnd 462) App III para 20.

6 See the Inclosure Act 1845 s 11; and PARA 419.

7 These vary in different places, and it does not appear that a complete list is given in any of the cases. In Epping Forest one mare or gelding or two cows were allowed: see *Sewers Comrs v Glasse* (1874) LR 19 Eq 134 at 161. Inclosure cases show that a horse is usually equivalent to two cows, and a cow to five sheep, foals and calves being allowed to run with their mothers till weaned. On registration, any grazing rights not limited by number were to be quantified: see the Commons Registration Act 1965 s 15; and PARAS 435, 441.

8 See *Rigg v Earl of Lonsdale* (1857) 1 H & N 923, Ex Ch; *Pochin v Duncombe* (1857) 1 H & N 842; *R v Whixley Inhabitants* (1786) 1 Term Rep 137; *Welcome v Upton* (1840) 6 M & W 536. There would seem to be no reason why they should not be conveyed in individual shares or otherwise, and it is believed that they have been so dealt with. The commonable rights of tenants of former manorial lands were converted to fee simple rights on enfranchisement: see the Law of Property Act 1922 Sch 12 para (4) (repealed); and **REAL PROPERTY** vol 39(2) (Reissue) PARA 35.

Rights of this nature would probably now be classed as in gross if separate from land. In view of *Bettison v Langton* [2001] UKHL 24, [2002] 1 AC 27, [2001] 3 All ER 417 their nature depends on the register. If registered as rights in gross they still have that status but if not, they cannot now be severed from land: see the Commons Act 2006 s 9; and PARA 498.

9 See the Commons Registration Act 1965 s 22(1); the Commons Act 2006 s 61(1); and PARA 405.

10 Cooke's Inclosure Acts (4th Edn) 44. See also 'heaf' in the *Report of the Royal Commission on Common Land 1955-1958* (Cmnd 462) App VI Glossary.

11 Sheep heaves are better considered as profits of sole herbage.

12 Cooke's Inclosure Acts (4th Edn) 45. Although not mentioned, so far as is known, in any of the law books, the word 'heaf' is also used in the north of England to denote a particular part of a common or moor which has been chosen by a commoner for the pasturage of his flock, and which is well known by both dogs and sheep. After long user claims have sometimes been made to an exclusive right of pasturage over this portion, but it was always held in inclosure proceedings that the system had only been adopted as a convenient mode of exercising the right over the whole common by the different commoners. The same practice prevails in many parts of Wales under the term 'arosfa'; and is considered, although not under that term, in *A-G v Reveley* (1869) Karslake's Special Rep. Belief in the exclusive right led to the action of *Richards v De Winton* [1901] 2 Ch 566. The same practice prevailed on Coulsdon Common, in Surrey: see *Hall v Byron* (1877) 4 Ch D 667 at 672-673. Note also Gadsden *The Law of Commons* (1988) p 98, equating sheepwalks and sheep heaves.

The expression 'hefted' is often used in many parts of the country for sheep which are adapted to a particular part of a moor and in that case the flock is often sold with the dominant tenement and its common rights. Slaughter of hefted flocks was a serious problem at the time of the Foot and Mouth disease outbreak in 2001 as the farmer would have to acquire and adapt a completely new flock to the relevant area of the common. Another word, used in the South West (especially on Dartmoor), is 'leared'.

13 As to the Inclosure Act 1845 see PARA 419 et seq. As to the use of the terms 'inclose', 'inclosure' etc see PARA 418 note 2; and as to inclosure generally see PARA 418 et seq.

14 The statement in the text must be taken as referring to the beneficial interest in the soil.

15 See the Inclosure Act 1845 s 113 (repealed), and ss 114-120 (amended by the Statute Law Revision Act 1891; the Inclosure Act 1845 ss 114, 115 further amended by the Statute Law (Repeals) Act 1998).

16 See PARA 586 et seq; and the *Report of the Royal Commission on Common Land 1955-1958* (Cmnd 462) App III paras 49, 50.

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(4) INCLOSURE OF COMMONS AND COMMON FIELDS

418. Inclosure before 1845.

Until the enactment of the Inclosure Act 1845¹ the inclosure² of commons³ was carried out by various means at common law or by custom or by private Inclosure Act⁴. The Act of 1845 and its numerous amending Acts provided a procedure for inclosure and subsequent large scale inclosures were carried out under that Act or the Commons Act 1876 under the supervision of the Inclosure Commissioners and their successors⁵ although small areas of land could still be inclosed by agreement or (until 1925) under local custom. The early procedures may still be relevant in ascertaining the legal history of a common⁶.

The proper custodian of an inclosure award made under a private or local Act passed before 1845 can be ascertained by reference to the Act itself⁷. Some difficulty may be experienced in tracing awards at the present day⁸.

1 As to the Inclosure Act 1845 see PARA 419 et seq.

2 In this title 'inclosure' is generally used as meaning a legal process involving the extinction of common rights, as opposed to the 'enclosure' of land with fences or walls: see the *Report of the Royal Commission on Common Land 1955-1958* (Cmnd 462) App III para 29.

3 As to commons and common lands see PARAS 406-407.

4 Nearly 4,000 such Acts were passed during the 100 years preceding 1845.

5 As to the Inclosure Commissioners and their successors see PARA 423 note 3.

6 For a fuller account of the various Inclosure Acts before 1845 reference may be made to the *Report of the Royal Commission on Common Land 1955-1958* (Cmnd 462) App III paras 25-47.

7 The directions for the enrolment of inclosure awards vary greatly in the numerous private and local Acts. Sometimes they were directed to be enrolled with the clerk of the peace for the county only, sometimes with the clerk of the peace and a specified court of record; sometimes the particular court was not mentioned. But where enrolment in more than one place was directed, the parties were frequently content with making one enrolment, or did not enrol at all.

8 Many awards are at the National Archives at Kew and at various County Record Offices. Some are now available on the internet; eg at the date at which this volume states the law, those of Berkshire were accessible at www.berkshirenclousure.org.uk. The Crown Estate Commissioners have information as to the whereabouts of awards affecting Crown property only. The Land Registry, as successor to the Middlesex Registry of Deeds, has a few Middlesex awards, and many relating to lands in the East, North and West Ridings of Yorkshire were formerly at the Registry of Deeds at Beverley, Northallerton and Wakefield, respectively. These registries are now closed (see the Law of Property Act 1969 s 16 (repealed by the Statute Law (Repeals) Act 2004)) and only those documents which the relevant county council considers deserving of preservation are required to be retained (see the Law of Property Act 1969 s 18). As to the Crown Estate Commissioners see **CROWN PROPERTY** vol 12(1) (Reissue) PARA 679.

Other possible sources of information are the steward of the manor, the parish or community council, the incumbent of the parish or community, the diocesan registrar and the chapter clerk. There is reason to believe that some awards are in private hands. As to parishes and communities and their councils see **LOCAL GOVERNMENT** vol 69 (2009) PARAS 22, 27-34, 41-46.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/1. INTRODUCTION/(4) INCLOSURE OF COMMONS AND COMMON FIELDS/419. Scope of the Inclosure Acts 1845 to 1899.

419. Scope of the Inclosure Acts 1845 to 1899.

The scope of the Inclosure Act 1845, which marked the commencement of a new era in the history of legislation dealing with the inclosure of commons, appears from its long title: 'An Act to facilitate the Inclosure and Improvement of Commons and Lands held in common, the Exchange of Lands, and the Division of intermixed Lands; to provide Remedies for defective or incomplete Executions, and for the Non-execution, of the Powers of general and local Inclosure Acts; and to provide for the Revival of such Powers in certain Cases'¹.

A series of amending Acts² was passed to supply omissions and deficiencies which practice discovered in the original Act until the year 1876, when, in consequence of the altered attitude of Parliament and the country towards the inclosure of commons (as shown by the fact that no inclosures had been sanctioned by Parliament during the preceding ten years), the Commons Act 1876 was passed. That Act made provision for much fuller information to be given to the Inclosure Commissioners³ in any application relating to a common with reference to the land proposed to be dealt with, its situation and characteristics, and the circumstances of the neighbourhood; inclosure was only to be approved if it was for the benefit of the neighbourhood⁴. It also provided for a method of regulation under which, while the common remained in its natural state, the rights of common and other rights of the commoners and of the lord of the manor or other owner of the soil could be ascertained and put under proper regulation, and the common itself could be improved by drainage, manuring and planting, and put under the management of a body of conservators with byelaws and regulations for the prevention of nuisances and for keeping order on the common⁵.

Lands which might be dealt with under the Inclosure Acts included not only commons or waste lands in the ordinary sense of the word⁶ but also:

- 26 (1) all lands⁷ subject to any rights of common whatsoever, whether such rights might be exercised or enjoyed at all times, or might be exercised or enjoyed only during limited times, seasons or periods, or were subject to any suspension or restriction whatsoever in respect of the time of the enjoyment thereof⁸;
- 27 (2) all gated and stinted pastures⁹ in which the property of the soil or of some part thereof was in the owners of the cattlegates¹⁰ or other gates or stints, or any of them¹¹;
- 28 (3) all gated and stinted pastures in which no part of the property of the soil was in the owners of the cattlegates or other gates or stints, or any of them¹²;
- 29 (4) all lands held, occupied or used in common, either at all times, or during any time or season, or periodically, and either for all purposes or for any limited purpose, and whether the separate parcels of the several owners of the soil were or were not known by metes or bounds or otherwise distinguishable¹³;
- 30 (5) all lands in which the property or right of or to the vesture or herbage¹⁴ or any part thereof during the whole or any part of the year, or the property or right of or to the wood or underwood growing and to grow thereon, was separated from the property of the soil¹⁵; and
- 31 (6) all lot meadows¹⁶ and other lands the occupation or enjoyment of the separate lots or parcels of which was subject to interchange among the respective owners in any known course of rotation or otherwise¹⁷.

The New Forest and the Forest of Dean were expressly excluded from inclosure by the Inclosure Act 1845¹⁸, and impliedly from regulation or inclosure under the Commons Act 1876¹⁹.

If, when they had taken into consideration the information supplied with an application for inclosure, the Inclosure Commissioners or their successors were of opinion that it was desirable to proceed further in the matter, they ordered a local inquiry to be held by an assistant Commissioner²⁰. The procedure under the Commons Act 1876 relating to such inquiries²¹ is still relevant for the purposes of the Acts scheduled to the Commons Act 1899²². The Inclosure Acts may otherwise be regarded as largely obsolete²³, and their provisions are relevant only in so far as they affect existing titles to land or disputed registrations under the Commons Registration Act 1965 or the Commons Act 2006²⁴.

Only 29 applications for inclosure were made under the Inclosure Act 1845 after 1876, the last being in 1914²⁵.

1 The Inclosure Act 1845 was passed consequent upon the *Report of the Select Committee on Commons Inclosure*, dated 5 August 1844.

2 The Inclosure Acts 1845 to 1882, by virtue of the Short Titles Act 1896, comprise the following Acts: the Inclosure Act 1845; the Inclosure Act 1846; the Inclosure Act 1847; the Inclosure Act 1848; the Inclosure Act 1849; the Inclosure Commissioners Act 1851 (repealed); the Inclosure Act 1852; the Inclosure Act 1854; the Inclosure Act 1857; the Inclosure Act 1859; the Inclosure, &c, Expenses Act 1868; the Commons Act 1876; the Commons (Expenses) Act 1878; the Commons Act 1879; and the Commonable Rights Compensation Act 1882. The Commons Act 1899 is to be read with the Inclosure Acts 1845 to 1882: see the Commons Act 1899 s 24. See, however, *R v Brooker, ex p Hitchin Town Football and Social Club Ltd* (1990) Times, 17 April, where it was held that although the Commonable Rights Compensation Act 1882 is included in the term 'Inclosure Acts 1845 to 1882' it is not part of the statutory code to be found in the Inclosure Acts.

3 As to the Inclosure Commissioners and their successors see PARA 423 note 3.

4 See the Commons Act 1876 preamble (repealed), s 7. See also *Hampshire County Council v Milburn* [1991] 1 AC 325 at 339, [1990] 2 All ER 257 at 259, HL, per Lord Templeman.

5 As to the regulation of commons under the Inclosure Acts 1845 to 1882 see PARA 586 et seq.

6 As to commons and common lands generally see PARAS 406-407.

7 For these purposes, 'land' means and includes all messuages, lands and corporeal tenements and hereditaments: Inclosure Act 1845 s 167.

8 Inclosure Act 1845 s 11.

9 As to gated and stinted pasture see PARA 417.

10 As to the meaning of 'cattlegate' see PARA 417.

11 Inclosure Act 1845 s 11.

12 Inclosure Act 1845 s 11.

13 Inclosure Act 1845 s 11.

14 As to the meaning of 'herbage' see PARA 411 note 2.

15 Inclosure Act 1845 s 11.

16 As to lot meadows see PARA 415.

17 Inclosure Act 1845 s 11.

18 Inclosure Act 1845 s 13 (amended by the Statute Law Revision Act 1891). This restriction, so far as it related to two commons in the Forest of Dean (Walmore Common and the Bearce Common), was removed by an Act of 1866 and the two commons were subsequently inclosed.

19 For the purposes of the Commons Act 1876, 'common' means any land subject to be inclosed under the Inclosure Acts: Commons Act 1876 s 37.

20 Commons Act 1876 s 10(6).

21 As to the relevant procedure see the Commons Act 1876 s 11. See also s 7 (statutory provisions for the benefit of the neighbourhood which were to be inserted into the draft provisional inclosure order as appropriate). The order might also set forth any special agreement or matter relating to the land to be dealt with (including an agreement to bring old inclosed land within the operation of the order), and might make such agreement a condition of the order: see the Inclosure Act 1848 s 1 (repealed). Under this provision coupled with the Inclosure Act 1845 s 27 (repealed) an agreement that the sporting rights should be severed from the soil, and the tenement thus created remain in the lord while the soil is allotted to others, could be validly inserted in a provisional order: see *Musgrave v Forster* (1871) LR 6 QB 590. The draft provisional order required confirmation by Act of Parliament: see the Commons Act 1876 s 12(1) (repealed).

22 See PARA 476.

23 The Inclosure Act 1845 s 147, which provides for the exchange of land, is repealed by the Commons Act 2006 Sch 6 Pt 3, but at the date at which this volume states the law, that repeal was not in force in relation to Wales. In recent years, the only use which has been made of the power under the Inclosure Act 1845 s 147 has been to exchange common land or a town or village green for other land, so that the land given in exchange is substituted for the former common land or green: see the Explanatory Notes to the Commons Act 2006 para 93. The Commons Act 2006 ss 16, 17 (not yet in force in relation to Wales) now provide a replacement mechanism for the exchange of land to which Pt 1 (ss 1-25) (not fully in force) applies: see PARA 545 et seq. Unlike an order under the Inclosure Act 1845 s 147, however, an order under the Commons Act 2006 s 17 has no effect on the title to the release land or any replacement land, nor on any easement or proprietary rights in the land (other than rights of common): see the Explanatory Notes to the Commons Act 2006 para 99.

24 As to registration see PARA 506 et seq.

25 See the *Report of the Royal Commission on Common Land 1955-1958* (Cmnd 462) App III para 43. The Commission accordingly recommended that the provisions of the Inclosure Acts relating to inclosure, and the provisions of other Acts authorising inclosure without the sanction of Parliament, should be repealed, though without prejudice to existing schemes under them: see the *Report of the Royal Commission on Common Land 1955-1958* (Cmnd 462) Ch VIII para 401. Piecemeal repeal has taken place: for modern repeals see eg the Statute Law (Repeals) Act 1998; the Commons Act 2006 Sch 6 Pt 3. See also the *Sixteenth Statute Law Revision Report* (Law Com no 252, 1998), App 2 Pt VI.

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420. Improvement, maintenance, roads and fencing.

After the regulation or inclosure of land subject to being inclosed under the Inclosure Acts¹ had been confirmed by Act of Parliament, a valuer was appointed to operate the machinery for inclosure². When the persons who would be entitled to have the land subject to being inclosed divided among them had been ascertained, and the extent of their respective rights determined, the valuer proceeded to execute such works of general improvement as the circumstances of the case might require, to enable him to make convenient allotments when the land was divided among the persons interested to be held in severalty³. All such ponds, ditches, watercourses, embankments, tunnels, and bridges made in pursuance of that power must at all times afterwards be repaired, cleansed, and maintained by such persons and in such manner as directed by the valuer⁴.

The soil of the roads set out under an inclosure award remained in their previous ownership, unless the owner's right and interest in the soil had been compensated by an allotment⁵. Where such an allotment had been made, the ownership of the soil of the roads was in the allottees of the lands on either side⁶. The fact that rights of pasturage over a road were given by an Inclosure Act to the adjoining owners did not transfer the ownership of the soil to them⁷. Where an allotment under an Inclosure Act abutted on a road with a roadside strip the presumption that the strip belonged to the adjoining owner was rebutted⁸.

The valuer was required to set out private or occupation roads and ways for the use of the persons interested and such private roads or ways for the use of persons interested in other lands as might become necessary in consequence of the alteration of public roads and ways⁹. The valuer had a discretion in each case as to the amount of formation and completion of private or occupation roads or ways set out in his award, and could, if necessary, set out footways to accommodate inclosed lands or adjoining owners¹⁰. He could also direct to whom the grass and herbage on the roads and ways was to belong, but in the absence of any direction the grass or herbage belonged to the owners of the soil of the adjoining lands on either side as far as the crown of the road¹¹. Where private roads or rights of way were set out under an inclosure for the benefit of certain persons or the owners of particular lands without any qualification, those persons were not confined to access to the lands in respect of which the right was given for the purposes only for which the right was required at the time of the award, although the use to which the right of way was subsequently put could increase the burden on the land over which it passes¹². In the absence, however, of such an express grant, the burden on land over which there was a right of way could not be increased¹³. All private or occupation roads or ways over, through or upon the lands to be inclosed which were not set out in a valuer's award were for ever stopped up and extinguished¹⁴.

Allotments were to be inclosed, fenced and ditched, and the fences and ditches subsequently maintained and repaired at the expense of the allottees, in accordance with the directions given by the valuer¹⁵.

The Inclosure Commissioners¹⁶ could by order dispense with the erection of boundary fences and direct the allotments to be distinguished by metes and bounds, but any person interested in an allotment could at any time fence at his own expense¹⁷. Such allotments while remaining unfenced were to be subject to the provisions relating to regulated pastures¹⁸ in such manner as the valuer, with the approbation of the Commissioners, by his award directed, and the owners were to enjoy such rights of common by reason of vicinage as they were entitled to before the setting out of the allotments¹⁹.

- 1 le the Inclosure Acts 1845 to 1899: see PARA 419.
- 2 See the Inclosure Act 1845 ss 33-38, 128, 129 (all repealed); the Commons Act 1876 s 32 (repealed).
- 3 See the Inclosure Act 1845 s 62 (repealed).
- 4 Inclosure Act 1845 s 61 (amended by the Statute Law Revision Act 1891; and by the Statute Law (Repeals) Act 1998).
- 5 *Poole v Huskinson* (1843) 11 M & W 827. See *R v East Mark Inhabitants* (1848) 11 QB 877; cf *R v Edmonton Inhabitants* (1831) 1 Mood & R 24; *R v Wright* (1832) 3 B & Ad 681.
- 6 *Neaverson v Peterborough RDC* [1901] 1 Ch 22, following *Haigh v West* [1893] 2 QB 19 at 29, CA.
- 7 *Hooper v Bourne* (1877) 3 QBD 258 at 284-285, CA; *R v Hatfield Inhabitants* (1835) 4 Ad & El 156.
- 8 *Gery v Redman* (1875) 1 QBD 161.
- 9 See the Inclosure Act 1845 s 68 (amended by the Statute Law Revision Act 1891; and by the Statute Law (Repeals) Act 1998); and the Inclosure Act 1848 s 4 (amended by the Statute Law Revision Act 1891; and by the Statute Law (Repeals) Act 1998). The setting out of an occupation road by the valuer raised no presumption as to the ownership of the soil: *R v Hatfield Inhabitants* (1835) 4 Ad & El 156. Formerly a right of way could not be gained by prescription against the Crown (see *Harper v Charlesworth* (1825) 6 Dow & Ry KB 572; *Wood v Veal* (1822) 5 B & Ald 454); but now as regards rights of way which can be gained under the Prescription Act 1832, the Crown and a subject are on the same footing (see s 2; and **EASEMENTS AND PROFITS A PRENDRE** vol 16(2) (Reissue) PARA 100). Much depends on the terms of the wording of the Inclosure Act under which the award was made.
- 10 *Reynolds v Barnes* [1909] 2 Ch 361. As to the expenses of setting out, forming, completing and maintaining private roads and ways see the Inclosure Act 1845 s 68; and the Inclosure Act 1848 s 4 (both as amended: see note 9). See also the Inclosure Act 1848 ss 6, 7 (both amended by the Statute Law Revision Act 1891) (appointment of rating officer entrusted with the maintenance and repair of the roads, watercourses etc and empowered to make and recover the necessary rate).
- 11 Inclosure Act 1845 s 68 (as amended: see note 9).
- 12 *Newcomen v Coulson* (1877) 5 ChD 133, CA.
- 13 See *Wimbledon and Putney Commons Conservators v Dixon* (1875) 1 ChD 362, CA; *Harris v Flower* (1904) 74 LJ Ch 127, CA; *Taff Vale Rly Co v Gordon Canning* [1909] 2 Ch 48.
- 14 Inclosure Act 1845 s 68 (as amended: see note 9).
- 15 Inclosure Act 1845 s 83 (amended by the Statute Law Revision Act 1891; and by the Statute Law (Repeals) Act 1998). A grant of copyhold land inclosed from the waste, coupled with evidence that the fences had been maintained by the grantee, afforded a presumption that the grant was made subject to an obligation on the part of the grantee to make and maintain a fence to keep out the commoner's cattle, and consequently that he was bound to fence against the owners of adjoining allotments after inclosure: *Barber v Whiteley* (1865) 34 LJQB 212. As to the abolition of copyhold tenure see **REAL PROPERTY** vol 39(2) (Reissue) PARA 31 et seq. As to the continuing liability of successors of the original allottees to fence see *Marlton v Turner* [1998] 3 EGLR 185, and the decisions therein considered; much depends on the terms of the wording of the Inclosure Act under which the award was made.
- 16 As to the Inclosure Commissioners and their successors see PARA 423 note 3.
- 17 This provision was intended to meet the case of mountain inclosures, which would remain as pasturage, and in which the expenses of fencing would be out of proportion to the value of the land.
- 18 See PARAS 417, 421.
- 19 Inclosure Act 1857 s 2. As to rights of pasture in vicinage see PARAS 448-451.

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421. Conversion of land into regulated pasture.

Provision was made for the whole or part of a common to be converted into a regulated pasture, if, during the progress of the inclosure, persons whose interest exceeded one half of the total value of interests so desired¹.

The owners of stints in the regulated pasture were also empowered, with the consent of the lord of the manor or other owner of the soil, to make byelaws and regulations for the prevention of and protection from nuisances or for keeping order on the regulated pasture, and for the general management, occupation and enjoyment of the regulated pasture, and by such byelaws pecuniary penalties, to be recovered before a magistrates' court, could be imposed on persons breaking the same².

Any person having any stock or animals on a regulated pasture contrary to the regulations of the pasture is guilty of an offence and liable on summary conviction to a fine not exceeding level 1 on the standard scale in respect of each head of livestock found³.

1 See the Inclosure Act 1845 ss 113, 121, 122 (repealed); ss 114-120; and PARA 417. The right of soil in a regulated pasture, subject to the rights of the lord of the manor to minerals and other rights vested in him, was to be vested in the owners of the stints in proportion to their respective shares: s 116 (amended by the Statute Law Revision Act 1891).

2 Commons Act 1876 ss 15, 16. Any byelaws made in this way, or by conservators of a regulated common, were of no validity until confirmed by the Secretary of State: see ss 16, 17. As to the Secretary of State see PARA 423. The Secretary of State's functions under the Commons Act 1876 were transferred to the National Assembly for Wales in 1999, and are now exercisable by the Welsh Ministers: see PARA 423.

3 Inclosure Act 1852 s 33 (amended by the Statute Law (Repeals) Act 1993). The 'standard scale' means the standard scale of maximum fines for summary offences as set out in the Criminal Justice Act 1982 s 37: see the Interpretation Act 1978 s 5, Sch 1 (definition added by the Criminal Justice Act 1988 s 170(1), Sch 15 para 58); and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 142. At the date at which this volume states the law, the standard scale is as follows: level 1, £200; level 2, £500; level 3, £1,000; level 4, £2,500; level 5, £5,000: Criminal Justice Act 1982 s 37(2) (substituted by the Criminal Justice Act 1991 s 17(1)). As to the determination of the amount of the fine actually imposed, as distinct from the level on the standard scale which it may not exceed, see the Criminal Justice Act 2003 s 164; and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 144.

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422. Final award and correction of award.

Within one month after the division of the land to be inclosed and staking out the allotments (unless the time was extended by the Inclosure Commissioners¹), the valuer² had to send to the office of the Commissioners a report in writing, signed by him, together with a map³. The award was prepared and engrossed on parchment by the valuer, under the direction of the Inclosure Commissioners, describing the boundaries, if any, which had been ascertained, and it set out under the provisions of the Inclosure Acts⁴ the matters contained in the report and a declaration whether all or any and which of the mines, minerals, stone and other substrata had or had not been included in the estimate of the right and interest of the lord of the manor or his successor in the soil in respect of which an allotment might have been made to him⁵.

The award and map annexed thereto, when signed by the valuer, were confirmed by the Inclosure Commissioners and sealed with the date of confirmation⁶. Two copies of every confirmed award and of the map, if separate, were made and sealed with the seal of the Commissioners, one of which was deposited with the clerk of the county council⁷, and the other with the council of the parish⁸ in which the lands or the greater part of them were situated, or with such other fit persons as the Commissioners approved⁹. They were kept with the county and parish records respectively, and persons interested were entitled to inspect them, and to be furnished with copies or extracts¹⁰. The confirmation of the award was conclusive evidence that the requirements of the Inclosure Acts had been complied with; no award could be impeached by reason of any mistake or informality in it or in the inclosure proceedings; and all allotments, exchanges, partitions, directions, and matters specified and set forth in the award were binding and conclusive on all persons¹¹.

The confirmed award is to be received as satisfactory evidence of all matters therein recited and stated, and copies or extracts signed by the clerk of the county council are to be received as evidence without further proof¹².

If the award had omitted to distinguish any land in respect of tenure, estate or title, or had awarded an aggregate allotment where there should have been separate allotments, the Inclosure Commissioners could, at any time within two years after the confirmation of the award, on the application of any person interested, rectify the omission or subdivide the allotment, upon investigation and at the expense of the applicant, by a separate instrument under their seal, which was deposited with and deemed part of the original award¹³.

In case of any fraudulent or other error or omission in any confirmed award the Commissioners or their successors could at any time, by an order under their seal, correct the error or supply the omission at the expense of the applicant; and the order, if not indorsed, had to be deposited with the award¹⁴.

1 As to the Inclosure Commissioners and their successors see PARA 423 note 3.

2 As to the appointment of the valuer see PARA 420.

3 See the Inclosure Act 1845 s 102 (repealed); the Inclosure Act 1852 s 15 (repealed). The report specified all the claims allowed, the allotments, exchanges and partitions, the roads, ways, works and easements set out or directed to be made or reserved by the valuer, and any other directions or determinations which the valuer considered necessary; and the map showed and distinguished the lands to be inclosed, the lands to be sold or exchanged, the lands in respect of which allotments were made, and such other particulars as were required by the Commissioners: Inclosure Act 1845 s 102 (repealed). The Commissioners could, if they thought it desirable,

and in order to save expense, make an order dispensing with the necessity of showing on the map the inclosed lands in respect of which the allotments were made: Inclosure Act 1848 s 2 (repealed). In such a case the inclosed lands were described in the schedule to the award in which the allotments were set out by reference to the numbers on the ordnance map or the tithe map of the parish.

4 le the Inclosure Acts 1845 to 1899: see **PARA 419**.

5 Inclosure Act 1845 s 104 (repealed).

6 Inclosure Act 1845 s 104 (repealed).

7 As to counties, county boroughs, and their councils see **LOCAL GOVERNMENT** vol 69 (2009) **PARAS 22, 24-26**.

8 The parish council for these purposes was originally the churchwardens or chapelwardens: see the Local Government Act 1894 s 6(1)(b). As to parishes and communities and their councils see **LOCAL GOVERNMENT** vol 69 (2009) **PARAS 22, 27-34, 41-46**.

9 Inclosure Act 1845 s 146 (amended by the Statute Law Revision Act 1891; and by virtue of the Decimal Currency Act 1969 s 10(1)).

10 Inclosure Act 1845 s 146 (as amended: see note 9).

11 Inclosure Act 1845 s 105 (amended by the Statute Law Revision Act 1891). See *Jacomb v Turner* [1892] 1 QB 47 (where the effect of this provision was considered, and it was held that the award was not conclusive as to the allottee's title). See also *Blackett v Ridout* [1915] 2 KB 415, CA.

12 Inclosure Act 1845 s 146 (as amended: see note 9). A return of all the inclosure awards or copies of them deposited with the clerks of the peace or of the county councils in England and Wales was made in 1904: see the House of Commons Return (No 50 of 1904).

13 See the Inclosure Act 1845 s 107 (amended by the Statute Law Revision Act 1891; and by the Statute Law (Repeals) Act 1998). The Commissioners also had similar powers under the Inclosure Act 1845 s 152 (repealed) of remedying defects and omissions in awards under local Inclosure Acts, or under the Inclosure Act 1836 (repealed).

14 Inclosure Act 1852 s 29.

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(5) ADMINISTRATION

(i) Central Administration

423. The Secretary of State and the Welsh Ministers; in general.

Ministerial powers and functions in respect of commons are exercised by the Secretary of State¹ or, in relation to Wales, by the Welsh Ministers².

The powers and functions of the Secretary of State and the Welsh Ministers so far as relating to commons broadly encompass the following:

- 32 (1) to exercise the former functions of the Inclosure Commissioners³ so far as relating to the inclosure of land and to the extent that the legislation relating thereto continues to have effect⁴;
- 33 (2) to exercise the former functions of the Inclosure Commissioners so far as relating to the regulation of metropolitan commons⁵;
- 34 (3) to make provision for and to regulate the statutory system of commons registration⁶;
- 35 (4) to make provision for and in connection with the statutory system of public access over common land⁷;
- 36 (5) to confirm byelaws for the protection of commons⁸;
- 37 (6) to approve the application and use of money accruing from the compulsory acquisition of commons⁹;
- 38 (7) to make regulations in connection with schemes for the regulation of commons by local authorities or the users of the commons¹⁰;
- 39 (8) to consent (or not) to agreements for the inclosure and division of commons¹¹;
- 40 (9) in the case of the Secretary of State, to consent (or not) to the acquisition of common land for ecclesiastical purposes¹²;
- 41 (10) to confirm (or not) orders prohibiting the stationing of caravans on commons¹³;
- 42 (11) to consent (or not) to building or work on National Trust property which prevents or impedes access by the public¹⁴;
- 43 (12) to intervene in connection with proposals for the compulsory acquisition of common land¹⁵;
- 44 (13) to amend relevant enactments¹⁶;
- 45 (14) to restrain unauthorised agricultural activities¹⁷;
- 46 (15) to establish commons councils¹⁸ and confer functions on them¹⁹;
- 47 (16) to consent to the carrying out of restricted works²⁰; and
- 48 (17) to grant exemptions for the carrying out of specified works²¹.

1 As to the office of Secretary of State see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 355. In practice, functions in relation to commons in England are exercised by the Secretary of State for Environment, Food and Rural Affairs.

2 Pursuant to the establishment of the Welsh Assembly Government under the Government of Wales Act 2006 Pt 2 (ss 45-92) (see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**), statutory functions relating to commons, including functions under subordinate legislation, so far as exercisable in relation to Wales, are now almost

exclusively the responsibility of the Welsh Ministers (ie the First Minister and the Welsh Ministers established under ss 46, 48: see s 45(2); and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**): see s 58, Sch 3, Sch 11 para 26. These functions were previously transferred to the National Assembly for Wales by Order in Council under the Government of Wales Act 1998 s 22 (repealed) (see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, arts 2, 3, Sch 1, which continues to have effect by virtue of the Government of Wales Act 2006 Sch 11 para 26) or, in the case of functions under the Commons Act 2006, were expressed to be functions of the Assembly (see s 44(4) (definition of 'national authority') and PARA 613 note 19; s 61(1) (definition of 'appropriate national authority'; and PARA 411 note 1). Included amongst the transferred functions are those under the Inclosure Acts 1845 to 1882 (see PARA 419 note 2) (other than the Commons Act 1879, which confers no ministerial powers); the Commons Act 1899; the Commons Act 1908; the Law of Property Act 1925 s 193; the Caravan Sites and Control of Development Act 1960 Sch 2 para 4(2), (3); the Commons Registration Act 1965; the National Trust Act 1971 s 23; the New Towns Act 1981 Sch 4 para 13(1), (2); the Acquisition of Land Act 1981 s 19; and the Wildlife and Countryside Act 1981: National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. Additionally, functions under the Countryside and Rights of Way Act 2000 Pt I (ss 1-46), so far as relating to Wales, were vested in the Assembly.

3 The Inclosure Commissioners for England and Wales were established in 1845 under the Inclosure Act 1845 s 2 (repealed) to oversee the new statutory system for the inclosure of land introduced in that year, and were subsequently granted a number of powers under the Inclosure Acts 1845 to 1882. The Commissioners were amalgamated with the Copyhold Commissioners and the Tithe Commissioners in 1851 under the Inclosure Commissioners Act 1851 s 2 (repealed), and in 1882 they were renamed the Land Commissioners for England under the Settled Land Act 1882 s 48 (repealed). Their functions then passed to the Board of Agriculture under the Board of Agriculture Act 1889 s 2(1)(b), 11, Sch 1 Pt II (repealed, so far as material) and now, to the extent that they remain exercisable (see note 4), belong to the Secretary of State or, in relation to Wales, to the Welsh Ministers. As to the use of the terms 'inclose', 'inclosure' etc see PARA 418 note 2; as to inclosure generally see PARA 418 et seq; and as to the Inclosure Acts 1845 to 1882 see PARA 419 note 2.

4 See the Inclosure Acts 1845 to 1882; and PARA 419 et seq. As to the regulation of commons under the Commons Act 1876 see PARA 586 et seq. Although many of the statutes relating to inclosure remain in force, the process itself may now be considered obsolete: see PARA 419 note 1.

5 See the Metropolitan Commons Acts 1866 to 1898; and **LONDON GOVERNMENT**.

6 See the Commons Registration Act 1965 Pt I (ss 1-46); the Commons Act 2006 Pt 1 (ss 1-25); and PARA 506 et seq.

7 See the Countryside and Rights of Way Act 2000 Pt I (ss 1-46); the Law of Property Act 1925 s 193; and PARAS 580-581.

8 See PARAS 421, 586.

9 See PARAS 489-491.

10 See PARAS 590, 593, 599-600.

11 See PARA 504.

12 See PARA 477.

13 See PARA 583.

14 See PARA 618.

15 See PARAS 481-482.

16 See PARA 424.

17 See PARA 611.

18 See PARA 601.

19 See PARA 604.

20 See PARAS 612-614.

21 See PARA 617.

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INTRODUCTION/(5) ADMINISTRATION/(i) Central Administration/424. Power to amend relevant enactments.

424. Power to amend relevant enactments.

The appropriate national authority¹ may by order² amend any relevant Act³ so as to secure that:

- 49 (1) a provision of that Act applying to common land⁴ does not apply to land to which Part 1 of the Commons Act 2006⁵ applies⁶ and which is not registered as common land⁷;
- 50 (2) such a provision applies to either or both of the following:
- 3 4. (a) land registered as common land, or particular descriptions or areas of such land;
- 5. (b) land to which Part 1 of the 2006 Act does not apply⁸, or particular descriptions or areas of such land⁹.
- 4

A national authority¹⁰ may by order amend or repeal any provision of a local or personal Act passed before 19 July 2006¹¹ which applies to common land¹² for any of the following purposes:

- 51 (i) to remove any function of the national authority which relates to the common land;
- 52 (ii) to transfer such a function from the national authority to another person;
- 53 (iii) to remove a requirement that the national authority be consulted, or that its consent be obtained, in respect of any act or omission relating to the common land or any act or omission of a person concerned with the management of the common land;
- 54 (iv) to substitute for a requirement referred to in head (iii) above a requirement that a person other than the national authority be consulted, or his consent obtained, in relation to the act or omission¹³.

A national authority may also by order amend or repeal any provision of an Act made under the Commons Act 1876 confirming a provisional order of the Inclosure Commissioners¹⁴ for any of the following purposes:

- 55 (A) to remove any function of the national authority which relates to land to which the Act applies;
- 56 (B) to transfer such a function from the national authority to another person;
- 57 (C) to remove a requirement that the national authority be consulted, or that its consent be obtained, in respect of any act or omission relating to land to which the Act applies, or any act or omission of a person concerned with the management of such land;
- 58 (D) to substitute for a requirement referred to in head (C) above a requirement that a person other than the national authority be consulted, or his consent obtained, in relation to the act or omission¹⁵.

1 As to the meaning of 'appropriate national authority' see PARA 411 note 1.

2 As to the making of orders see generally the Commons Act 2006 s 59.

3 For these purposes, 'relevant Act' means any public general Act passed before the Commons Act 2006 (ie passed before 19 July 2006): s 54(3).

4 For these purposes, a provision applies to common land if it is expressed to apply (generally) to common land, any common or commons, commonable land, land subject to inclosure under any enactment or other land of a similar description: Commons Act 2006 s 54(4). As to the meaning of 'land' see PARA 403 note 1; as to the meanings of 'common', 'common land' and 'commonable land' see PARAS 406-407; and as to common lands see further PARA 408 et seq.

5 Ie the Commons Act 2006 Pt 1 (ss 1-25) (not fully in force).

6 As to the land to which the Commons Act 2006 Pt 1 does not apply see s 5(2)-(4); and PARA 411. Subject to that, Pt 1 applies to all land in England and Wales: s 5(1).

7 In the Commons Act 2006, any reference to land registered as common land is to land so registered in a register of common land and any reference to a register of common land is to such a register kept under Pt 1: see s 61(2).

8 See note 6.

9 Commons Act 2006 s 54(1).

10 For these purposes, 'national authority' is defined as meaning (1) the Secretary of State; and (2) the National Assembly for Wales: see the Commons Act 2006 s 55(4). However, the functions of the national authority in Wales under s 55 are now exercised by the Welsh Ministers: see PARA 423.

11 Ie passed before the Commons Act 2006.

12 For the purposes of the Commons Act 2006 s 55(1) (see heads (i)-(iv) in the text), 'common land' means (1) any land registered as common land (see note 7) or as a town or village green; (2) any land referred to in s 5(2) (see PARA 411); and (3) any land not falling within head (1) or head (2) above which is subject to a scheme under the Metropolitan Commons Act 1866 (see **LONDON GOVERNMENT**) or the Commons Act 1899 (see PARA 590 et seq): Commons Act 2006 s 55(2). In the Commons Act 2006, any reference to land registered as a town or village green is to land so registered in a register of town or village greens; and any reference to a register of town or village greens is to such a register kept under Pt 1: see s 61(2). As to land which may be registered in England and Wales as a town or village green under the Commons Act 2006 see s 15; and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 541.

13 Commons Act 2006 s 55(1).

14 As to the inclosure of common land see PARA 418 et seq.

15 Commons Act 2006 s 55(3).

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(ii) The Commons Commissioners

425. The Commons Commissioners.

At the date at which this volume states the law, the Commons Commissioners are appointed by the Lord Chancellor¹ to adjudicate on disputed registrations under the Commons Registration Act 1965². Such number of suitably qualified persons³ as the Lord Chancellor may determine are to be appointed⁴, and the Lord Chancellor must appoint one of the Commissioners to be Chief Commons Commissioner⁵. A Commons Commissioner must, subject to statutory provisions as to continuance in office⁶, vacate his office on the day on which he attains the age of 70 years⁷. The Lord Chancellor must also draw up and from time to time revise a panel of assessors to assist the Commons Commissioners in dealing with cases calling for special knowledge⁸. Provision is made for the remuneration of Commissioners and assessors and for the facilitation of the Commissioners' functions⁹.

The procedure before the Commissioners is governed by the Commons Commissioners Regulations 1971¹⁰. Any person aggrieved by the decision of a Commons Commissioner as being erroneous in point of law may, within such time as may be limited by rules of court, require the Commissioner to state a case for the decision of the High Court¹¹. No appeal to the Court of Appeal may be brought against the decision of the High Court in such a case except with the permission of that court or the Court of Appeal¹². Commissioners' decisions may also be challenged by judicial review, which would be appropriate where a Commissioner had exceeded his jurisdiction or failed to exercise it¹³.

As from a day to be appointed¹⁴, however, the above provisions are repealed by the Commons Act 2006¹⁵.

1 Commons Registration Act 1965 s 17(1)(a) (ss 17, 18 prospectively repealed by the Commons Act 2006 Sch 6 Pt 1, as from a day to be appointed under s 56(1); at the date at which this title states the law, no such day had been appointed). The Lord Chancellor's function under the Commons Registration Act 1965 s 17(1)(a) (prospectively repealed) is a protected function for the purposes of the Constitutional Reform Act 2005 s 19: see Sch 7 para 4; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

2 As to registration under the Commons Registration Act 1965 see PARA 506 et seq.

3 A person appointed to be a Commons Commissioner must satisfy the judicial-appointment eligibility condition on a five-year basis: Commons Registration Act 1965 s 17(1)(a) (amended by the Tribunals, Courts and Enforcement Act 2007 Sch 10 Pt 2 paras 45, 49; prospectively repealed (see note 1)). As to the judicial-appointment eligibility condition see the Tribunals, Courts and Enforcement Act 2007 ss 50-52; and **COURTS**.

4 See the Commons Registration Act 1965 s 17(1)(a) (as amended (see note 3); prospectively repealed (see note 1)).

5 Commons Registration Act 1965 s 17(1) (prospectively repealed: see note 1). If at any time the Chief Commons Commissioner is for any reason unable to act, the Lord Chancellor may appoint another Commons Commissioner to act in his stead: s 17(3) (prospectively repealed: see note 1). The Lord Chancellor's function under s 17(3) (prospectively repealed) is a protected function for the purposes of the Constitutional Reform Act 2005 s 19: see Sch 7 para 4; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

6 I.e. the Judicial Pensions and Retirement Act 1993 s 26(4)-(6), which empowers the Lord Chancellor to authorise continuance in office up to the age of 75 years: see **COURTS** vol 10 (Reissue) PARA 535.

7 Commons Registration Act 1965 s 17(1A) (added by the Judicial Pensions and Retirement Act 1993 Sch 6 para 26; prospectively repealed (see note 1)).

8 Commons Registration Act 1965 s 17(1)(b) (prospectively repealed: see note 1).

9 See the Commons Registration Act 1965 s 17(5) (prospectively repealed: see note 1).

10 See the Commons Registration Act 1965 s 19(1)(e) (repealed in relation to the pilot areas in England by virtue of SI 2008/1960; prospectively repealed in relation to the whole of England and Wales by the Commons Act 2006 Sch 6 Pt 1, as from a day to be appointed under s 56(1); at the date at which this title states the law, no such day had been appointed); and the Commons Commissioners Regulations 1971, SI 1971/1727. As to the pilot areas in England see PARA 467 text and notes 29-30.

As to the form and service of notices required or authorised to be sent or given to the Commissioners by the registration authorities, the documents to accompany the reference to the Commissioners, the entry of the reference, and other preliminary matters, see Pt I (regs 1-16); as to hearings before the Commissioners see Pt II (regs 17-29); and as to the Commissioners' decisions see Pt III (regs 30-33). As to the registration authorities see PARA 507. Where any proceedings have been begun by or before a Commissioner, but have not been concluded, the Chief Commons Commissioner may direct that the proceedings be continued by or before such other Commissioner as is named in the direction; and he must make such a direction where the Commissioner in question has died or become incapacitated or for some other reason is unable to continue with the proceedings: reg 29. A Commons Commissioner may order any party to any proceedings before him to pay to any other party to the proceedings any costs incurred by that party in respect of the proceedings: Commons Registration Act 1965 s 17(4) (prospectively repealed: see note 1). As to the exercise of this discretion see *Re West Anstey Common, North Devon* [1985] Ch 329, [1985] 1 All ER 618, CA; *Re Yateley Common, Hampshire, Arnold v Dodd* [1977] 1 All ER 505, [1977] 1 WLR 840.

11 Commons Registration Act 1965 s 18(1) (s 18 prospectively repealed by the Commons Act 2006 Sch 6 Pt 1, as from a day to be appointed under s 56(1); at the date at which this title states the law, no such day had been appointed). If the person aggrieved wishes to argue that the decision was reached on insufficient evidence, he should require the Commissioner to raise this question in the case stated: *Re Britford Common* [1977] 1 All ER 532, [1977] 1 WLR 39. A Commissioner's decision is capable of creating an issue estoppel: see *Crown Estate Comrs v Dorset County Council* [1990] Ch 297, [1990] 1 All ER 19.

12 Commons Registration Act 1965 s 18(2) (prospectively repealed: see note 11).

13 See *R v Chief Commons Comr, ex p Winnington* (1982) Times, 26 November.

14 See under the Commons Act 2006 s 56(1). At the date at which this volume states the law, no such day had been appointed in relation to the whole of England and Wales. As to the partial repeal of s 19 see note 10.

15 See the Commons Act 2006 Sch 6 Pt 1 (not fully in force).

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(iii) Powers of Local Authorities

426. Power to oppose extinction of common rights.

District councils in England and county or county borough councils in Wales¹ have power, with the consent of the council for the county or, in Wales, the county or county borough² within which common land³ is situated, to aid persons in maintaining rights of common⁴ the extinction of which would, in the opinion of the council, be prejudicial to the inhabitants of the district⁵, and to institute or defend legal proceedings, or take other expedient steps, for that purpose⁶.

1 The Local Government Act 1894 s 26(2) refers to district councils and the Act states that for these purposes that expression includes the council of every urban district, whether a borough or not, and of every rural district (s 21(3) (amended by the Local Government Act 1933 Sch 11 Pt IV, and by the London Government Act 1963 Sch 18 Pt II)). This should, however, be read as a reference to the local authorities referred to in the text: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq.

2 The Local Government Act 1894 s 26(2) refers to a county council but so far as relating to Wales, this should be read as a reference to a county or county borough council: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq.

3 As to the meaning of 'common lands' see PARA 407.

4 As to the meaning of 'right of common' see PARA 405.

5 Local Government Act 1894 s 26(2) (amended by the Statute Law (Repeals) Act 2004).

6 Local Government Act 1894 s 26(3).

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427. Power to make schemes.

At the date at which this title states the law, district councils in England, county or county borough councils in Wales¹, National Park authorities² and the Broads Authority³ are empowered to make schemes for the regulation and management of commons⁴ within their district or area with a view to the expenditure of money on drainage, levelling and improvement thereof and to the making of byelaws and regulations for the prevention of nuisances and the preservation of order on the commons⁵. It has been held that this power does not extend to granting private rights of way, at least where the owner of the land is known⁶.

As from a day to be appointed⁷, the local authorities mentioned above have powers to make schemes for the regulation and management of commons within their district or area in the public interest⁸.

1 The Commons Act 1899 s 1(1) refers to 'the council of an urban district' but in practice this is a reference to a district council in England and a county or county borough council in Wales: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq.

2 A National Park authority is empowered to make schemes under the Commons Act 1899 s 1 in respect of any registered common within the National Park or for which the authority is the local authority, provided the common in question is not owned by, or vested in, any other body which is a local authority, and references in s 1 to the council by which a scheme is made are to be construed accordingly: see the Environment Act 1995 s 70, Sch 9 para 1(1), (2)(a), (3), (5). For these purposes, 'registered common' means any land registered as common land or as a town or village green under the Commons Registration Act 1965 or, as from a day to be appointed, under the Commons Act 2006 Pt 1 (ss 1-25): Environment Act 1995 Sch 9 para 1(6) (prospectively amended by the Commons Act 2006 Sch 5 para 6(b), as from a day to be appointed under s 56(1); at the date at which this volume states the law, no such day had been appointed). As to the meaning of 'common land' for registration purposes see PARA 407; and as to registration see PARA 506 et seq. As to land which may be registered in England and Wales as a town or village green under the Commons Act 2006 see s 15; and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 541. As to National Parks and National Park authorities see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 636 et seq; and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 526 et seq.

3 By the Norfolk and Suffolk Broads Act 1988 s 2(6), Sch 3 Pt II para 38, in relation to any registered common within the Broads which is not owned by, or vested in, a local authority and which is not a staithe, the Broads Authority is to be treated as the local authority for these purposes and, in relation to any staithe which is within the Broads and registered as a common, a local authority is to exercise its functions jointly with the Broads Authority or with the consent of that Authority. 'Staithe' means any land which is adjacent to a waterway and which the inhabitants of the locality are entitled to use as a landing place: s 25(1). As to the Broads Authority see **WATER AND WATERWAYS** vol 101 (2009) PARA 734.

4 As to the meaning of 'common' for these purposes see PARA 590 note 4. A scheme must identify by reference to a plan the common to be regulated thereby: Commons Act 1899 s 1(3). At the date at which this volume states the law, an ordnance survey map (ie a map made under powers conferred by the Ordnance Survey Act 1841: see the Interpretation Act 1978 s 5, Sch 1) must, if possible, be used for this purpose (Commons Act 1899 s 1(3) (as originally enacted)); but this requirement is prospectively removed by the Commons Act 2006 s 50(1), (3), Sch 6 Pt 4, as from a day to be appointed under s 56(1); at the date at which this volume states the law, no such day had been appointed. As to the Ordnance Survey generally see **NATIONAL CULTURAL HERITAGE** vol 77 (2010) PARA 1110 et seq.

5 Commons Act 1899 s 1(1) (as originally enacted and amended by the Local Government Act 1972 Sch 30); Environment Act 1995 Sch 9 para 1(1), (2)(a). As to schemes see further PARAS 590-598. Parish and community councils may contribute to the expenses of any such scheme: see the Commons Act 1899 s 5; and PARA 595. As to parish and community councils see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq.

6 See *Newbury District Council v Russell* (1997) 95 LGR 705.

7 le as from a day to be appointed under the Commons Act 2006 s 56(1). At the date at which this volume states the law, no such date had been appointed.

8 Commons Act 1899 s 1(1) (as amended (see note 5); further prospectively amended, as from a day to be appointed (see note 7) by the Commons Act 2006 s 50(1), (2)(a)). As to the meaning of 'in the public interest' see the Commons Act 1899 s 1(1A) (not yet in force); and PARA 590 note 4.

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INTRODUCTION/(5) ADMINISTRATION/(iii) Powers of Local Authorities/428. Power to prohibit stationing of caravans and other encroachments on commons.

428. Power to prohibit stationing of caravans and other encroachments on commons.

A district council in England, a county or county borough council in Wales¹, a National Park authority² and the Broads Authority³ may make with respect to any land in its area which is or forms part of a common⁴ an order prohibiting, either absolutely or except in such circumstances as may be specified in the order, the stationing of caravans⁵ on the land for the purposes of human habitation⁶.

The Law of Property Act 1925 conferred a power on local authorities to make applications to the county court in respect of encroachments on commons⁷. At the date at which this volume states the law, that power was still available to county or county borough councils and National Park authorities in Wales⁸.

1 The Caravan Sites and Control of Development Act 1960 s 23 refers to 'the council of a district', but in practice this is a reference to a district council in England and a county or county borough council in Wales: see s 23(9) (added by the Local Government (Wales) Act 1994 Sch 16 para 16(1)). See further **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq.

2 A National Park authority is empowered to make orders under the Caravan Sites and Control of Development Act 1960 s 23, Sch 2, in respect of any registered common within the National Park or for which the authority is the local authority, provided the common in question is not owned by, or vested in, any other body which is a local authority: see the Environment Act 1995 s 70, Sch 9 para 1(1), (2)(c), (5). As to the meaning of 'registered common' for these purposes see Sch 9 para 1(6), cited in PARA 427 note 2. As to registration see PARA 506 et seq; and as to National Parks and National Park authorities see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 636 et seq; and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 526 et seq.

3 By the Norfolk and Suffolk Broads Act 1988 s 2(6), Sch 3 Pt II para 38, in relation to any registered common within the Broads which is not owned by, or vested in, a local authority and which is not a staithe, the Broads Authority is to be treated as the local authority for these purposes and, in relation to any staithe which is within the Broads and registered as a common, a local authority is to exercise its functions jointly with the Broads Authority or with the consent of that Authority. As to the Broads Authority see **WATER AND WATERWAYS** vol 101 (2009) PARA 734; and as to the meaning of 'staithe' see PARA 427 note 3.

4 For these purposes, 'common' includes any land subject to be inclosed under the Inclosure Acts 1845 to 1882, and any town or village green: Caravan Sites and Control of Development Act 1960 s 23(8). As to the Inclosure Acts see PARA 419 note 2. The power to make orders does not extend to land to which the Law of Property Act 1925 s 193 (which relates to the rights of the public over certain commons and waste lands: see PARA 581), for the time being applies, land which is subject to a scheme under the Commons Act 1899 Pt I (ss 1-15) (under which schemes may be made for the regulation and management of certain commons: see PARAS 427, 590 et seq), or land as respects which a site licence (ie a licence under the Caravan Sites and Control of Development Act 1960 Pt I (ss 1-32) authorising the use of land as a caravan site: see **TOWN AND COUNTRY PLANNING** vol 46(3) (Reissue) PARA 1032 et seq) is for the time being in force: s 23(1). As to the use of the terms 'inclose', 'inclosure' etc see PARA 418 note 2; and as to inclosure generally see PARA 418 et seq.

5 'Caravan' means any structure designed or adapted for human habitation which is capable of being moved from one place to another (whether by being towed, or by being transported on a motor vehicle or trailer) and any motor vehicle so designed or adapted, but does not include any railway rolling stock which is for the time being on rails forming part of a railway system or any tent: Caravan Sites and Control of Development Act 1960 s 29(1). See further **TOWN AND COUNTRY PLANNING** vol 46(3) (Reissue) PARA 1033.

6 Caravan Sites and Control of Development Act 1960 s 23(2) (amended by SI 1975/1636); Environment Act 1995 Sch 9 para 1(1), (2)(c). See further PARA 583. The function of making such an order is a 'relevant function' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 Pt 1 (ss 1-21) (see s 4, Sch 3; and **LOCAL GOVERNMENT** vol 69 (2009) PARA 733); thus the Local Better Regulation Office may give guidance to local authorities as to the exercise of that function (see s 7; and **LOCAL GOVERNMENT** vol 69 (2009) PARA 734).

7 See the Law of Property Act 1925 s 194(2) (repealed by the Commons Act 2006 Sch 6 Pt 2; for transitional provisions see Sch 4 paras 6-7). At the date at which this volume states the law, that repeal was not in force in relation to Wales.

8 See note 7.

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429. Power to provide amenities.

County and district councils in England, county and county borough councils in Wales¹, National Park authorities², the Common Council of the City of London³ and the London boroughs⁴ have a number of powers which may be exercised in respect of common land⁵ for the purpose of providing or improving opportunities for the enjoyment of the countryside by the public⁶, including the power to provide facilities and services (including meals and refreshments, parking places, shelters and lavatories) for the enjoyment or convenience of the public, to erect buildings and to carry out works⁷.

1 The Countryside Act 1968 s 6(2)(a) refers to 'the council of a county or county district' but in practice this is a reference to a county or district council in England and a county or county borough council in Wales. See **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq.

2 As to National Parks and National Park authorities see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 636 et seq; and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 526 et seq.

3 As to the Common Council of the City of London see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARA 51 et seq.

4 As to the London boroughs and their councils see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARAS 5, 29-30, 35 et seq.

5 For these purposes, 'common land' (1) at the date at which this volume states the law, has the meaning given by the Commons Registration Act 1965 s 22(1) (see PARA 407); (2) as from a day to be appointed under the Commons Act 2006 s 56(1), means (a) land registered as common land in a register of common land kept under the Commons Act 2006 Pt 1 (ss 1-25) (not fully in force); (b) land to which Pt 1 does not apply (see PARA 411) and which is subject to rights of common within the meaning of that Act (see PARA 405); Countryside Act 1968 s 9(6) (prospectively amended, so as to substitute for the definition set out in head (1) above the definition set out in head (2) above, by the Commons Act 2006 Sch 5 para 1(1), (2)). 'Land' includes any interest in or right over land: Countryside Act 1968 s 49(1).

6 See the Countryside Act 1968 ss 6, 9; the Environment Act 1995 s 70, Sch 9 para 5(a), (b); and PARA 580.

7 See the Countryside Act 1968 s 9(3); and PARA 580. The functions of local authorities under the Countryside Act 1968 are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 Pt 1 (ss 1-21) (see s 4, Sch 3; and **LOCAL GOVERNMENT** vol 69 (2009) PARA 733) thus the Local Better Regulation Office may give guidance to local authorities as to the exercise of those functions (see s 7; and **LOCAL GOVERNMENT** vol 69 (2009) PARA 734).

Consent to works under the Commons Act 2006 s 38 may, however, be required (see PARA 612) and also planning consent (see generally **TOWN AND COUNTRY PLANNING**).

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430. Powers over unclaimed land.

Where land¹ is registered as common land² or a town or village green³ but no person is registered in the register of title⁴ as the owner of the land⁵ and it appears to a local authority⁶ in whose area the land or any part of it is situated that the owner cannot be identified, the local authority may:

- 59 (1) take any steps to protect the land against unlawful interference that could be taken by an owner in possession of the land; and
- 60 (2) institute proceedings against any person for any offence committed in respect of the land, but without prejudice to any power that is otherwise exercisable⁷.

1 As to the meaning of 'land' see PARA 403 note 1.

2 As to the meaning of 'land registered as common land' see PARA 424 note 7.

3 As to the meaning of 'land registered as a town or village green' see PARA 424 note 12. As to land which may be registered in England and Wales as a town or village green under the Commons Act 2006 see s 15; and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 541.

4 'Register of title' means the register kept under the Land Registration Act 2002 s 1 (see **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 810 et seq; Commons Act 2006 s 61(1).

5 In the Commons Act 2006, references to the ownership or the owner of any land are references to the ownership of a legal estate in fee simple in the land or to the person holding that estate; and references to land registered in the register of title are references to land the fee simple of which is so registered: s 61(3).

6 For these purposes, 'local authority' means (1) a county, district or parish council in England; (2) a London borough council; and (3) a county, county borough or community council in Wales: Commons Act 2006 s 45(3). As to county, district and parish councils in England and county, county borough and community councils in Wales see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq; and as to London borough councils see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARA 35 et seq. Section 45 also has effect:

- 1 (a) in relation to a registered common within any National Park, for which a National Park authority is the local planning authority and which is not owned by, or vested in, any other body which is a local authority, as if the National Park authority were a local authority for the purposes of s 45 and as if the relevant park were within that authority's area (see the Environment Act 1995 s 70, Sch 9 para 1(1), (2)(d) (amended by the Commons Act 2006 Sch 5 para 6(a)));
- 2 (b) in relation to any registered common in the Broads which is not owned or vested in a local authority and is not a staithe, as if the Broads Authority were a local authority; and in relation to any staithe which is within the Broads and which is registered as a common, a local authority is to exercise its functions under the Commons Act 2006 s 45 jointly with the Broads Authority or with the consent of that authority (see the Norfolk and Suffolk Broads Act 1988 s 2(6), Sch 3 Pt 2 para 38(1)(1)(d) (2) (amended by the Commons Act 2006 Sch 5 para 4)).

As to the meaning of 'registered common' for the purposes of head (a) above see the Environment Act 1995 Sch 9 para 1(6), cited in PARA 427 note 2. As to registration see PARA 506 et seq; and as to National Parks and National Park authorities see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 636 et seq; and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 526 et seq. As to the Broads Authority see **WATER AND WATERWAYS** vol 101 (2009) PARA 734; and as to the meaning of 'staithe' see PARA 427 note 3.

7 Commons Act 2006 s 45(1), (2).

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/2. RIGHTS OF COMMON AND RELATED RIGHTS/(1) DESCRIPTIONS OF RIGHTS/(i) Classification of Rights of Common/431. Classification according to nature.

2. RIGHTS OF COMMON AND RELATED RIGHTS

(1) DESCRIPTIONS OF RIGHTS

(i) Classification of Rights of Common

431. Classification according to nature.

Rights of common are traditionally described as either: (1) appendant; (2) appurtenant; (3) in gross; or (4) by reason of vicinage¹.

Right of common appendant was a right by common law incident to the grant to certain tenants of arable land before the Statute of Quia Emptores², by which the tenant was entitled to the use of the manorial waste for such purposes as were necessary to the maintenance of his husbandry³. Right of common appurtenant is a right depending upon a grant, or upon a prescription which supposes a grant, annexing to particular lands a right of user of another piece of land⁴. A new right of common appurtenant is theoretically still capable of being created by express grant⁵, whereas a new right of common appendant is not, but as both types of right are now subject to the requirement of registration⁶, any other distinction between them is now of little practical importance⁷.

Right of common in gross is a right depending upon a grant or prescription entitling the possessor to some user of a particular piece of land without reference to the ownership of land⁸. Subject to certain exceptions⁹, a right of common which is registered as attached to any land cannot now be severed from that land¹⁰.

Right of common by reason of vicinage is the right which the commoners of certain adjoining lands have of letting their cattle stray over the dividing boundary. Although such a right is limited and may be better described as the mutual forbearance of adjoining commoners to fence, it is registrable for the purposes of the Commons Registration Act 1965 and the Commons Act 2006¹¹.

The Commons Act 2006 provides that if registered a right of common is deemed to exist¹² although evidence may be produced to demonstrate the existence of a constraint on its exercise¹³.

1 Cooke's Inclosure Acts (4th Edn) 5. For a detailed treatment of this method of classification see PARA 433 et seq.

2 18 Edw 1 c 1 (Quia Emptores) (1289-90). This statute declared that where a man thereafter conveyed land the purchaser should hold of the same lord and by the same services as the vendor. As after that statute no subject could grant land to be held freely of himself, all the freehold tenements of a manor must date from before that time. Subsequent sales by a lord of a manor sever the land from the manor. The land sold, therefore, cannot enjoy a right of common appendant, which attaches to land held freely of a manor or, if attached to other arable lands, must date from time immemorial. See further **REAL PROPERTY** vol 39(2) (Reissue) PARA 7. As to the effect of a sale by the lord of the manor, since the Statute of Quia Emptores, of lands owned by him, see further PARA 497.

3 *Earl of Dunraven v Llewellyn* (1850) 15 QB 791. In the Commons Registration Act 1965 and the Commons Act 2006 the definition of 'common land' includes waste land of a manor not subject to rights of common: see PARA 407. As to appendant rights see further PARAS 433-438.

- 4 As to appurtenant rights see further PARAS 439-445.
- 5 See the Commons Act 2006 s 6(3) (not fully in force); and PARA 469.
- 6 As to the requirement of registration see PARA 403.
- 7 As to the distinction between rights of common appendant and appurtenant see further PARA 439 text and note 3. See also *Bettison v Langton*[2001] UKHL 24, [2002] 1 AC 27, [2001] 3 All ER 417.
- 8 As to rights of common in gross see further PARAS 446-447.
- 9 See the Commons Act 2006 s 9(2); and PARA 498.
- 10 See the Commons Act 2006 s 9; and PARA 498.
- 11 See further PARAS 448-451; and for an analysis of a right of common by reason of vicinage see *Newman v Bennett*[1981] QB 726, [1980] 3 All ER 449.
- 12 See the Commons Act 2006 s 18(3) (not fully in force); and PARA 529.
- 13 See the Commons Act 2006 s 18(5) (not fully in force); and PARA 529.

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432. Classification by subject matter.

The several kinds of rights of common¹ are exercisable in different ways, according to the subject matter of the right, which includes generally all things which the soil naturally produces, and these natural productions have led to the division of the kinds of common into six main classes:

- 61 (1) common of pasture, or the right of feeding cattle², horses, sheep, or other animals on the land of another, which may exist either as appendant³, as appurtenant⁴, in gross⁵, or by reason of vicinage⁶;
- 62 (2) common of turbary, or the right of digging turves or peat out of another's soil⁷;
- 63 (3) common of estovers (or botes), or the right of taking from another's land the wood necessary for the sustenance of the commoner's house or agriculture⁸;
- 64 (4) common of piscary, or the right of fishing in another's water⁹;
- 65 (5) common of pannage, or the right to turn out swine in woodlands to feed on beech mast and acorns¹⁰; and
- 66 (6) common in the soil, namely the right of taking sand, gravel, stone and even minerals from another's soil¹¹.

There are also various miscellaneous profits which mostly come under one or other of the principal classes.

1 See PARA 431.

2 As to the meaning of 'cattle', and as to the animals in respect of which rights of common may be exercised, see PARA 436.

3 As to rights of pasture appendant see PARAS 433-438.

4 As to rights of pasture appurtenant see PARAS 439-445.

5 As to rights of pasture in gross see PARAS 446-447.

6 As to rights of pasture by reason of vicinage see PARAS 448-451.

7 As to common of turbary see PARAS 457-458.

8 As to common of estovers see PARAS 459-460.

9 As to common of piscary see PARAS 461-464.

10 As to common of pannage see PARA 409.

11 See Co Litt 41b, 122a; and PARAS 465-466.

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(ii) Common of Pasture and Related Rights

A. COMMON OF PASTURE APPENDANT

433. Nature and origin of right.

Common of pasture appendant was the right which every freehold tenant of a manor possessed in respect of his anciently arable land¹ to depasture on the wastes of the manor his commonable cattle, levant and couchant². It was said to be of common right, that is a manorial privilege attached by the common law to a grant by a lord (before the Statute of Quia Emptores³) of arable land, on the ground that such a grant included without express words the grant of sufficient pasture in the wastes for the commonable beasts levant and couchant on the land⁴.

Common of pasture appendant to anciently arable land must have existed beyond the time of legal memory, that is, before 1189⁵, although it is unnecessary now to prove this early origin. Therefore it cannot be created at the present day⁶.

As common of pasture appendant must have existed from time out of mind, and in many cases was destroyed by repurchase or other unity of possession of the tenement to which it was attached and the manor in the hands of the lord⁷, it was not so frequently met with as common of pasture appurtenant⁸, but it had one important characteristic, that to establish a claim it was not necessary to prove actual user of the right. Where it was proved that the land was held freely of the manor and that it was in such a condition that it was capable of being restored to arable land⁹, a right of common for commonable cattle necessarily attached to the land and might be exercised by the owner or occupier¹⁰. If, however, the character of the land had been so entirely altered that it was incapable of producing any grass or other natural product, as, for instance, if it had been entirely covered with houses or was the site of a reservoir¹¹, or for a lengthened period had ceased to produce grass or herbage¹², the question of the abandonment of the right of common arose¹³.

All rights of common of pasture are now subject to the requirement of registration¹⁴. If not registered, they are not exercisable¹⁵. The Commons Act 2006 provides that if registered the right is deemed to exist¹⁶ although evidence may be produced to demonstrate the existence of a constraint on its exercise¹⁷.

1 Common of pasture appendant must exist in respect of land which was anciently arable: *Tyrringham's Case* (1584) 4 Co Rep 36b at fo 37. The law, however, will intend that all land which has immemorially had common of pasture appendant to it was originally arable, whatever may be its present state of cultivation; and therefore, where all the land was originally arable, the mere fact of a house having been built upon part of the land or part of it having been converted into meadow or pasture will not, if there has been a continual enjoyment of pasturage for cattle levant and couchant, destroy the original right: *Tyrringham's Case* (1584) 4 Co Rep 36b at fo 37, where a right of common was pleaded as appendant to a house, meadow, and pasture, and it was held that of his own showing the claimant had made it appear that it had been at all times a house, meadow, and pasture, and consequently that it could not be common appendant, but must be common appurtenant (as to which see PARAS 439-445). See also *Carr v Lambert* (1866) LR 1 Exch 168. A claim in respect of a manor will be applied to such parts of the land as may be presumed to have been anciently arable: *Tyrringham's Case* (1584) 4 Co Rep 36b; cf *Ricketts v Salwey* (1819) 2 B & Ald 360. On the same principle, claims have been allowed for a messuage or cottage, but only where land or a curtilage was attached: See Co Litt 5b and cases there cited; *Scholes v Hargreaves* (1792) 5 Term Rep 46 (where the claim was for a house with neither land, curtilage, nor stable, but only a small sheepfold attached to a butcher's shop); *Benson v*

Chester (1799) 8 Term Rep 396; *Emerton v Selby* (1704) 2 Ld Raym 1015; *Carr v Lambert* (1866) LR 1 Exch 168. As under an early Act every cottage was bound to have four acres of land annexed to it (see 31 Eliz 1 c 7 (1588-89) (Erection of cottages) (repealed), a yard or curtilage would be presumed. As to the meaning of 'cattle', and as to the animals in respect of which the right of common appendant may be exercised, see PARA 436; and as to levancy and couchancy see note 2.

2 On registration, however, the number of animals had to be quantified: see PARA 435. The old rules concerning levancy and couchancy are no longer of practical application. For an explanation of those rules see *Robertson v Hartopp* (1889) 43 ChD 484 at 517, CA, per Fry LJ.

3 As to the Statute of Quia Emptores see PARA 431 note 2.

4 The history of the distinction between commons appendant and commons appurtenant (as to which see PARAS 439-445) is discussed in Scrutton's Commons and Common Fields 42-55. The *Report of the Royal Commission on Common Land 1955-1958* (Cmnd 462) at para 271 recommends the abolition of this distinction and it is now of little if any practical importance: see PARA 431.

5 The beginning of the reign of Richard I: see Vin Abr, Common, C; Com Dig, Common, B; *Ughred v C* (1331) 5 Lib Ass fo 8, pl 2. For the different dates fixed from time to time as the commencement of legal memory, and for the reasons assigned for the alterations in the date, see the *First Report of the Real Property Commissioners* (H of C Paper (1829) no 263) p 51 et seq; and *Angus & Co v Dalton* (1878) 4 QBD 162 at 170, CA, per Thesiger LJ (affd sub nom *Dalton v Angus & Co* (1881) 6 App Cas 740, HL).

6 The creation of new rights of common is in any case restricted: see the Commons Act 2006 s 6 (not fully in force); and PARAS 467, 469. Since common of pasture appendant is of common right it was unnecessary to prescribe for it in the usual form as appendancy always implies prescription: Co Litt 121b, 122a; and see note (i) to *Tyrringham's Case* (1584) 4 Co Rep 36b at fo 37a; *Hayes v Bridges and Guess* (1795) Ridg L & S 390 at 410; and ----- v T (1426) YB 4 Hen 6 fo 13, pl 10, quoted in Hall's Profits à Prendre 247.

7 See PARA 495.

8 As to commons appurtenant see PARAS 439-445.

9 See, however, the presumptions as to land anciently arable, referred to in note 1.

10 Common appendant being of common right, this sometimes became important in estimating whether or not sufficient common had been left in a case of inclosure by the lord of the manor: see *Robertson v Hartopp* (1889) 43 ChD 484, CA. As to the use of the terms 'inclose', 'inclosure' etc see PARA 418 note 2; and as to inclosure see generally PARA 418 et seq.

11 See *Carr v Lambert* (1866) LR 1 Exch 168.

12 *Scrutton v Stone* (1893) 9 TLR 478; affd (1893) 10 TLR 157, CA.

13 See PARA 502.

14 As to the requirement of registration see PARA 403.

15 See PARA 403 text and note 8.

16 See the Commons Act 2006 s 18(3) (not fully in force); and PARA 529.

17 See the Commons Act 2006 s 18(5) (not fully in force); and PARA 529.

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434. Right incapable of being severed from land.

Common of pasture appendant belongs to arable land¹ and is so necessarily incident to it that it cannot be severed²; therefore, however often the land is divided, every parcel is entitled to common appendant, and the right is apportionable³. Where the owner of land to which common appendant belongs purchases part of the common, the right is apportioned; but in similar circumstances common appurtenant⁴ (except shack⁵) was, formerly, extinguished⁶.

1 See PARA 433.

2 It is stated in the Explanatory Notes to the Commons Act 2006 that the Commons Act 2006 s 9 and Sch 1 (prohibition of severance save for excepted cases: see PARAS 498-501) do not apply to appendant rights, since these were not formerly capable of severance: see the Explanatory Notes to the Commons Act 2006 para 64. However, in *Bettison v Langton* [2001] UKHL 24, [2002] 1 AC 27, [2001] 3 All ER 417, it is suggested that the Commons Registration Act 1965 s 15, which transformed grazing rights limited by levancy and couchancy into grazing rights for a fixed number of animals (see PARA 435), rendered all such rights potentially severable (see at [63] per Lord Scott of Foscote). By statute such rights cannot now be severed, save in excepted cases: see PARAS 498-501.

3 *Tyrringham's Case* (1584) 4 Co Rep 36b; Co Litt 122a; *Bennett v Reeve* (1740) Willes 227. As to apportionment see the Commons Act 2006 s 8 (not fully in force); and PARA 522.

4 As to common appurtenant see PARA 439 et seq.

5 As to shack see PARA 416.

6 See PARAS 442, 444, 497; and Com Dig, Common, L. See now, however, the Commons Act 2006 s 13(3); and PARA 497 note 6.

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435. Quantification on registration.

Where a right of common¹ consists of or includes a right, not limited by number, to graze² animals of any class³, it is treated for the purposes of registration⁴ as exercisable in relation to no more animals, or animals of that class, than a definite number⁵. When the registration of such a right has become final⁶ the right is accordingly exercisable in relation to numbers of animals not exceeding the number or numbers registered or such other number or numbers as Parliament may determine⁷.

Under the Commons Act 2006, an application to record a variation of a right of common consisting of a right to graze any animal must be refused if in the opinion of the commons registration authority⁸ the land over which the right is exercisable would be unable to sustain the exercise of that right once varied, taken with any other rights exercisable over that land⁹.

1 As to the meaning of 'right of common' for the purposes of registration see PARA 405.

2 The right to pasture must be exercised reasonably with minimum interference of the landowner's rights. The right to graze is a right to take grass from the common; it is not an incident of that right to bring extra feed onto the land. Attending to the welfare of the animals in question is, however, an incident of a right of pasture; and general shepherding by a vehicle over a large area of land is *prima facie* reasonable: *Besley v John* [2003] EWCA Civ 1737, [2003] 43 LS Gaz R 33, [2003] All ER (D) 481 (Oct).

3 As to the animals in respect of which the right may be exercised see PARA 436.

4 *Ie* under the Commons Registration Act 1965: see PARA 508 *et seq.*

5 Commons Registration Act 1965 s 15(1) (s 15 repealed in relation to the pilot areas in England by virtue of SI 2008/1960; prospectively repealed in relation to the rest of England, and in relation to Wales, by the Commons Act 2006 Sch 6 Pt 1, as from a day to be appointed under s 56(1); at the date at which this volume states the law, no such day had been appointed). This, in effect, abrogates, after registration, the rule of levancy and couchancy. See also *Bettison v Langton* [2001] UKHL 24, [2002] 1 AC 27, [2001] 3 All ER 417. Any application for the registration of such a right was required to state the number of animals to be entered in the register or, as the case may be, the numbers of animals of different classes to be so entered: Commons Registration Act 1965 s 15(2) (repealed and prospectively repealed).

6 As to registrations becoming final see PARA 508. Once registered under the Commons Registration Act 1965, a right of common continues to be registered for the purposes of the Commons Act 2006: see s 3(3) (not fully in force); and PARA 527. The repeal and prospective repeal of the Commons Registration Act 1965 s 15 (see note 5) does not, therefore, affect the requirement that the number of animals must be quantified.

7 Commons Registration Act 1965 s 15(3) (repealed and prospectively repealed: see note 5).

8 As to registration authorities see PARA 507.

9 See the Commons Act 2006 s 7(5) (not fully in force); and PARA 522.

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436. Cattle in respect of which right may be exercised.

The right of common appendant was traditionally confined to such cattle¹ as served for the maintenance of the plough, as horses and oxen to plough the land, and sheep and kine to compester (that is to manure) it². Pigs, goats, geese, or similar animals were not commonable by virtue of a right of common appendant³.

As the cattle turned upon the common by virtue of the right of common of pasture appendant were to be the cattle which ploughed and compestered the land to which the right was appendant⁴, the commoner could not agist the cattle of a stranger for hire⁵; that is to say, he could not let his right. It seems, however, that by statute such a right may now be licensed or let for a limited period⁶.

1 'Cattle' is not, in the context of rights of common of pasture, restricted to animals of the bovine genus, but, in accordance with its use as 'a collective name for live animals held as property, or reared to serve as food, or for the sake of their milk, skin, wool etc' (Oxford English Dictionary), includes animals that serve for ploughing and manuring the land.

2 Co Litt 122a. Elton defined common appendant as 'a prescriptive right in freehold tenants of a manor of feeding their cattle used in agriculture upon the lord's waste' (Elton on Commons 47), and refers to YB 37 Hen 6 fo 34 pl 20, and Bro Abr, Common, 13, 16. See further *Mitcham Common Conservators v Banks* (1912) 76 JP 413. The turning out on commons of male animals which have not been castrated may be regulated by resolution of the commoners: see PARAS 599-600.

3 Co Litt 122a; and cf *Standred v Shorditch* (1620) Cro Jac 580. The nature of the right now depends on registration: see PARA 403.

4 YB 45 Edw 3 p 25, c 38.

5 22 Lib Ass pl 84; YB 11 Hen 6 p 22, c 19. As to agistment see generally **ANIMALS** vol 2 (2008) PARAS 721-723. If, however, having no beasts of his own, he borrowed those of a stranger for the purpose of ploughing or compestering his land, he had then a special property in those cattle sufficient to entitle him to turn them on the common: *Rumsey v Rawson* (1669) 1 Vent 18.

6 See the Commons (Severance of Rights) (England) Order 2006, SI 2006/2145; the Commons (Severance of Rights) (Wales) Order 2007, SI 2007/583; and PARA 500. Those provisions, however, apply to rights of common to which the Commons Act 2006 s 9(1) (prohibition of severance: see PARA 498) applies: see the Commons (Severance of Rights) (England) Order 2006, SI 2006/2145, art 2(1); the Commons (Severance of Rights) (Wales) Order 2007, SI 2007/583, art 2(1). As to whether the Commons Act 2006 s 9(1) applies to rights of common appendant (which were traditionally incapable of severance) see PARA 434 note 2.

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437. Effect of partial exercise of right.

The right of a commoner to common appendant is not affected by the fact that his farm is understocked, or by the land being temporarily put to a purpose which renders the maintenance of sheep or cattle upon it impossible¹.

¹ *Leech v Widsley* (1670) 1 Vent 54; *Robertson v Hartopp* (1889) 43 ChD 484 at 516, CA, per Fry LJ; and cf *Musgrave v Inclosure Comrs* (1874) LR 9 QB 162. See also *Willis v Ward* (1818) 2 Chit 297 (where a right of all the commoners' cattle levant and couchant was held to be good, though the common was not sufficient to support all for any length of time; as to levancy and couchancy see PARA 433 note 2).

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438. Demesne lands.

Since a person cannot prescribe against himself, common of pasture appendant cannot exist in respect of the demesne lands of the manor over the wastes of the manor. The rights of pasturage enjoyed by the lessees of the lord of the manor in respect of farms forming part of the manor were not strictly rights of common at all, but were incident to the rights of the lord as owner of the soil¹. They are, however, frequently spoken of as rights of common, or more accurately as quasi rights of common², and, on the inclosure³ of a common, the lord almost invariably received an allotment in respect of them in the same way as the commoners⁴.

In practice many agricultural tenants of demesne land did register under the Commons Registration Act 1965⁵.

1 *Musgrave v Inclosure Comrs* (1874) LR 9 QB 162 at 175 per Blackburn J; *Baring v Abingdon* [1892] 2 Ch 374 at 400, CA, per Kay J.

2 See *Musgrave v Inclosure Comrs* (1874) LR 9 QB 162; *Askew v Wilkinson* (1832) 3 B & Ad 152.

3 As to the use of the terms 'inclose', 'inclosure' etc see PARA 418 note 2; and as to inclosure see generally PARA 418 et seq.

4 See the Inclosure Act 1845 ss 77, 79 (both repealed).

5 The precise effect at the time is unclear and it is possible some Commons Commissioners disallowed the registration if it was challenged. Many were not (it would not normally be in the interest of the owner of the common to challenge rights registered by his own farm tenants) and may thus have become final. The probable result of the Commons Act 2006 s 9 (see PARA 498) is to attach them to the farm in respect of which they were registered so that when the tenancy comes to an end the owner of the soil cannot appropriate the rights to other land. See also PARA 495.

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B. COMMON OF PASTURE APPURTENANT

439. Nature and acquisition of rights.

A right of common of pasture appurtenant is a right appertaining to certain lands by which the owner of those lands feeds cattle¹ on the soil of another person².

This right differs from the right of common of pasture appendant in that it does not arise of common right and is not a manorial privilege attached by the common law to a grant of arable land by a lord before the Statute of Quia Emptores³. It is normally created by express or implied grant⁴, or acquired by prescription⁵, although the creation of new rights is restricted under the Commons Act 2006⁶.

A conveyance of land together with all rights appertaining thereto, or like words, may pass a right of pasture appertaining to that land in equity; and for the purpose of discovering whether any such right existed, and is capable of passing under the conveyance, the contract for sale may be looked at⁷. However, the enjoyment of grazing facilities on land by tenants of the owner of the soil holding under leases or tenancy agreements is not sufficient to establish a reputation of rights appurtenant to the lands comprised in their holdings so as to pass under statute⁸.

In order to establish a right of pasture appurtenant it is not necessary for the claimant to establish that he and his predecessors have exercised the right continuously, such right being a profit of a kind that of its nature would only be used intermittently. Nevertheless, user must be of such a character, degree and frequency as to indicate an assertion of a continuous right⁹.

1 As to the meaning of 'cattle', and as to the animals in respect of which rights of common may be exercised, see PARA 436 note 1.

2 See Cooke's Inclosure Acts (4th Edn) 19.

3 As to the Statute of Quia Emptores see PARA 431 note 2. As to the right of common of pasture appendant see PARAS 433-438.

4 See *Re Broxhead Common, Whitehill, Hampshire* (1977) 33 P & CR 451 (customary right of common of pasture passed to lessee as appurtenant to customary lease under the Law of Property Act 1925 s 62(1) without express mention); *Owen v Blathwayt* [2002] EWHC 2231 (Ch), [2003] 1 P & CR 444, [2002] All ER (D) 01 (Nov). As to the Law of Property Act 1925 s 62(1) see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 236.

5 As to the creation and acquisition of rights of common see PARA 467 et seq. As to the problems on acquiring rights of common by prescription since the coming into effect of the Commons Registration Act 1965 see Gadsden *The Law of Commons* (1988) pp 126-131.

6 See the Commons Act 2006 s 6 (not fully in force); and PARAS 467, 469.

7 See *White v Taylor (No 2)* [1969] 1 Ch 160, [1968] 1 All ER 1015 (where various parcels of land were conveyed together with pasturage rights for sheep over land which immediately previous thereto had been in common ownership with the parcels conveyed, so that such rights could not have existed at law); considered in *Besley v John* [2003] EWCA Civ 1737, [2003] 43 LS Gaz R 33, [2003] All ER (D) 481 (Oct). See also the Law of Property Act 1925 s 62(1); and **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 236. Under the Commons Act 2006 s 9 (prohibition of severance: see PARA 498), the right will automatically pass with the dominant land.

8 le under the 'general words' implied by the Law of Property Act 1925 s 62 (see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007) PARA 236): see *White v Taylor (No 2)*[1969] 1 Ch 160 at 185, [1969] 1 All ER 1015 at 1028.

9 See *White v Taylor (No 2)*[1969] 1 Ch 160 at 192, [1968] 1 All ER 1015 at 1032.

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440. By whom the right may be taken.

A right of common of pasture appurtenant also differs from the right of common of pasture appendant¹ in all those incidents which are occasioned by the origin of the latter in the connection between the arable land of the manor and the waste². Thus it might be taken by freeholders in a manor whether their lands had been held by the lord within the time of legal memory (that is, since 1189)³ or not⁴, and also by freeholders as appertaining by force of a special custom to estates formerly copyhold⁵ or customary freehold⁶, by a local authority or trustees for a body of inhabitants having cattle levant and couchant⁷ within their area⁸, or by any strangers to the manor who by grant or long acquiescence of the lord had gained this privilege upon the waste⁹. The tenants of a manor might also have common appurtenant in the waste of another lordship¹⁰. Common appurtenant may now be claimed by any person or body of persons legally capable of taking by grant, which is supposed to be the foundation of the right, although inhabitants, occupiers, or any fluctuating class of persons, unless incorporated or unless an incorporation for the purpose can be presumed, are incapable of prescribing¹¹.

All such rights which were in existence prior to 2 January 1970¹² must, however, have been registered under the Commons Registration Act 1965¹³ and if not so registered are no longer exercisable¹⁴. That Act also made provision for the registration of new rights¹⁵. The Commons Act 2006 restricts the creation of new rights¹⁶; any new rights created are to be subject to registration under that Act¹⁷.

1 As to the right of common of pasture appendant see PARAS 433-438.

2 See *Earl of Dunraven v Llewellyn* (1850) 15 QB 791; and PARA 433.

3 See PARA 433 text and note 5.

4 This is because the right may be granted at the present day: see PARA 439.

5 Copyhold has been abolished, subject to a saving for commonable rights: see **REAL PROPERTY** vol 39(2) (Reissue) PARA 31 et seq.

6 *Robertson v Hartopp* (1889) 43 ChD 484; *Hall v Byron* (1877) 4 ChD 667 at 681.

7 As to the meaning of 'cattle', and as to the animals in respect of which rights of common may be exercised, see PARA 436 note 1. As to levancy and couchancy see PARA 433 note 2.

8 *Boteler v Bristow* (1475) YB 15 Edw 4, fols 29, 32, 33.

9 Elton on Commons 63; and see the cases cited in note 10.

10 *Sacheverell v Porter* (1637) W Jo 396, Fitz Nat Brev 180 N; *Clarkson v Woodhouse* (1782) 5 Term Rep 412n.

11 See PARA 472. The statement made by Lord Coke that 'for common appurtenant one must prescribe' (Co Litt 122a) means only that when no grant can be produced the claimant must rely upon a prescriptive title, as is clear from other passages in his own writings and many subsequent authorities: see Co Litt 121a; *Sacheverell v Porter* (1637) W Jo 396; *Cowlam v Slack* (1812) 15 East 108.

12 Ie the last date for making an initial application for registration under the Commons Registration Act 1965: see PARA 508 note 6.

- 13 As to the requirement of registration see PARA 403.
- 14 See PARA 403 note 8.
- 15 See PARA 467.
- 16 See the Commons Act 2006 s 6 (not fully in force); and PARAS 467, 469.
- 17 See the Commons Act 2006 s 6(5) (not fully in force); and PARA 467.

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441. Quantification of right.

Common of pasture appurtenant was formerly either for a number certain¹, or the measure of the right was referred to levancy and couchancy²; but it was clearly settled that there had to be some limit to the right³. The Commons Registration Act 1965, however, required grazing rights⁴ to be registered⁵, and those rights which were formerly limited by levancy and couchancy became a right to graze a fixed number of animals as noted on the register⁶.

Under the Commons Act 2006, the creation of a new right of common⁷ consisting of a right to graze animals is not to be registered if in the opinion of the commons registration authority⁸ the land over which the right is exercisable would be unable to sustain the exercise of that right taken with any other rights exercisable over that land⁹; and similar restrictions apply to the variation of any such right of common¹⁰.

1 Common limited to a certain number could either be for a definite number of one particular kind of stock or a definite number of several kinds, or could be limited to a certain number for each acre or each yard land of the tenement, or according to its rental. Where such was proved to be the case, it was generally considered by the courts to be a convenient method of measuring the number of cattle which might be turned on in respect of each tenement, and to be practically the measure of levancy and couchancy, eg not more than one sheep per acre (*Hall v Byron* (1877) 4 ChD 667); so many head according to rental with a fixed scale (*Fox v Amhurst* (1875) LR 20 Eq 403 at 404). Where the method of fixing the number by acreage or rental was adopted, it was merely a matter of agreement, binding only upon those who assented to it (see *Bruges v Curwin* (1706) 2 Vern 575; contra *Delabeere v Beddingfield* (1689) 2 Vern 103 (a case of doubtful authority)), unless long user established a custom.

2 The expression 'common sans nombre', which is frequently met with in the early cases, or 'common without stint', meant common for beasts levant and couchant, it being uncertain how many there were in any particular year, and did not mean common for any number of beasts without limit: see further PARA 447. It was used in distinction to 'common for a number certain' (Vin Abr, Common, I; *Chichly v ----* (1658) Hard 117), and was a common certain in its nature (see the note to *Earl of Manchester v Vale* (1666) 1 Saund 23 at 28c). As to levancy and couchancy see PARA 433 note 2.

3 *Benson v Chester* (1799) 8 Term Rep 396; *Bennett v Reeve* (1740) Willes 227; and see *Morley v Clifford* (1882) 20 ChD 753. A claim to grazing rights must now have been quantified on registration: see the text and notes 4-6.

4 As to the meaning of 'grazing rights' see *Besley v John* [2003] EWCA Civ 1737, [2003] 43 LS Gaz R 33, [2003] All ER (D) 481 (Oct), cited in PARA 435 note 2.

5 See the Commons Registration Act 1965 s 15; and PARA 435. As to registration see PARA 508 et seq.

6 See *Bettison v Langton* [2001] UKHL 24, [2002] 1 AC 27, [2001] 3 All ER 417.

7 As to the creation of new rights of common see the Commons Act 2006 s 6 (not fully in force); and PARAS 467, 469.

8 As to the commons registration authorities see PARA 507.

9 See the Commons Act 2006 s 6(6) (not fully in force); and PARA 467.

10 See the Commons Act 2006 s 7(5) (not fully in force); and PARA 522.

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442. Whether connection with land necessary.

Although in order to maintain a claim for common of pasture appurtenant to land it was necessary to show some connection between the commonable beasts and the land to which the right was claimed to be appurtenant¹, there was not the same necessity where the claim was for a number certain², since the question whether the right had been used to excess could not arise³.

The Commons Registration Act 1965 required all grazing rights to be quantified for registration purposes⁴, and such rights might be severed from the land to which they were formerly attached, in which case they became rights in gross⁵. Many livestock farmers were then able to buy rights in order to pasture numerous animals, leading to management difficulties for common land where some right holders had no close contact with the common and those who managed it⁶. The Commons Act 2006 now prohibits further severance, subject to certain limited exceptions⁷.

¹ *Jones v Richard* (1837) 6 Ad & El 530; *Hoskins v Robins* (1671) Poll 13; *Scholes v Hargreaves* (1792) 5 Term Rep 46; *Baylis v Tyssen-Amhurst* (1877) 6 ChD 500.

² See PARA 441.

³ See *Richards v Squibb* (1698) 1 Ld Raym 726 per Holt CJ. Thus, when the number was once ascertained, the right might be attached to a dwelling house or a cottage without land: *Leniel v Harslop* (1672) 3 Keb 66. But see Cooke's Inclosure Acts (4th Edn) 2. The right of common for a number certain might be appurtenant also to a manor without land: *Spooner v Day and Mason* (1636) Cro Car 432; Vin Abr, Common, M, 4; *Musgrave v Gave* (1742) Willes 319; *Stamford v Burgess* (1675) Sheppard's Abridgment 381.

Common of pasture for a number certain could have been parcel of a manor and before 1926 could have been demised by copy of court roll. (Such rights, and rights of cattlegate and the like (see PARA 417), are 'land' within the meaning of the Law of Property Act 1922 s 188(1). They are therefore enfranchised (see ss 128, 189 (repealed)), and may be demised as any other freehold). This right when so limited appeared to lose all necessity of appurtenancy to land. It might be severed from the land and the appurtenancy destroyed: *Bunn v Channen* (1813) 5 Taunt 244; *Daniel v Hanslip* (1672) 2 Lev 67; and see *Drury v Kent* (1603) Cro Jac 14. Prior to 28 June 2005 (the date when the Commons Act 2006 s 9 is deemed to have come into force: see PARA 498), a registered appurtenant right might be severed unless severance was prevented by a local Commons Act: see *Bettison v Langton* [2001] UKHL 24, [2002] 1 AC 27, [2001] 3 All ER 417.

Common of pasture certain could be appurtenant to an office, as to a burgage in a borough (*Miller v Walker* (1670) 1 Sid 462; *Cox v Glue* (1848) 5 CB 533; cf *Withers v Iseham* (1551) 1 Dyer 70 a (park-keeper)), and perhaps even to an inhabitant of a town (*Mellor v Spateman* (1669) 1 Saund 339, 343; *Fowler v Dale* (1594) Cro Eliz 362; *Weekly v Wildman* (1698) 1 Ld Raym 405). A plea claiming an immemorial right of common in occupiers for the time being is bad, even after verdict: *Davies v Williams* (1851) 16 QB 546 at 559. It has been said that a man may prescribe to have this right by reason of his person, in which case the right of common appurtenant becomes a simple right of common in gross: YB 15 Edw 4, c 33.

⁴ See the Commons Registration Act 1965 s 15; and PARA 441. As to registration see PARA 508 et seq.

⁵ See *Bettison v Langton* [2001] UKHL 24, [2002] 1 AC 27, [2001] 3 All ER 417. As to common of pasture in gross see PARAS 446-467.

⁶ See 673 HL Official Report (5th series), 20 July 2005, col 148; and the Explanatory Notes to the Commons Act 2006 para 63.

⁷ See the Commons Act 2006 s 9, Sch 1; and PARAS 498-501.

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443. Animals in respect of which right exercised.

Common appurtenant is not confined to cattle¹ used to plough and compester (that is, manure); but may be for pigs, goats, geese, and all other animals which may be sustained upon the common². The turning out of male animals which have not been castrated may be affected by regulations made under statutory powers³.

A person entitled to a right of common of pasture appurtenant must, as in the case of common of pasture appendant⁴, use it in general with his own cattle; but if he employs the cattle of others to manure his own land, he may feed them on the land over which he has a right of common⁵. He cannot agist other cattle which do not manure his land⁶ but he may license or let the right for a limited period⁷.

1 As to the meaning of 'cattle', and as to the animals in respect of which rights of common may be exercised, see PARA 436 note 1.

2 Co Litt 122a; Bac Abr, Common, A, 2; 2 Bl Com 33. In *Withers v Iseham* (1551) 1 Dyer 70 a, a claim of common for hogs was raised, but not decided. In the absence of an express grant, evidence of user establishes the prescription, but where the grant is produced, as sometimes happens, the courts have to read the rights of the commoners in the terms of the instrument: see *Smith v Feverell* (1675) 2 Mod Rep 6; see also 1 Freem KB 190. A claim to turn out geese has been rejected on the ground that the user was not shown to have been in any way connected with the copyhold tenement: *Morley v Clifford* (1882) 20 ChD 753. See *White v Taylor (No 2)* [1969] 1 Ch 160, [1968] 1 All ER 1015; and see also Gadsden *The Law of Commons* (1988) pp 126-131, on the problems of establishing rights of common based on prescription since the coming into effect of the Commons Registration Act 1965. The nature of the right now depends on registration: see PARA 403. As to quantification of each class of animal on registration see s 15; and PARA 441.

3 Eg regulations made under the Commons Act 1908 s 1: see PARAS 599-600.

4 As to the right of common of pasture appendant see PARAS 433-438.

5 See Fitz Nat Brev 180 B; YB 14 Hen 6 p 6, c 29; *Molliton v Trevilian* (1683) Skin 137, sub nom *Manneton v Trevilian* 2 Show 328 (case 333). Cf, however, *Besley v John* [2003] EWCA Civ 1737, [2003] 43 LS Gaz R 33, [2003] All ER (D) 481 (Oct) (right of pasture did not imply right to bring in extra feed).

6 See *Rumsey v Rawson* (1669) 1 Vent 18; Vin Abr, Common, H, N; *Monk v Butler* (1620) Cro Jac 574.

7 See the Commons (Severance of Rights) (England) Order 2006, SI 2006/2145; the Commons (Severance of Rights) (Wales) Order 2007, SI 2007/583; and PARA 500. It was formerly possible to license a stranger to put in his cattle: see *Hoskins v Robins* (1671) 2 Saund 319 at 324, 327; and see Fitz Nat Brev 180 B.

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444. Effect of purchase of part of waste.

At common law, a purchase by the commoner of part of the land on which common appurtenant is enjoyed extinguishes the whole right¹. This is in contrast to the situation where the common in question is a common appendant, in which event the right is proportionately reduced or apportioned². Where the common is appurtenant or in gross the right is extinguished³.

However, the Commons Act 2006 provides that a right of common⁴ which is registered in a register of common land or town or village greens⁵ cannot be extinguished by operation of common law⁶ and can only be removed from the registers as provided by statute⁷. At the date at which this volume states the law, these provisions were in force only in relation to the pilot areas in England⁸.

1 *White v Taylor* [1969] 1 Ch 150, [1967] 3 All ER 349; and see PARA 496. All registered grazing rights are for a fixed number of animals: see *Bettison v Langton* [2001] UKHL 24, [2002] 1 AC 27, [2001] 3 All ER 417; and see PARA 441. As to registration see PARAS 403, 506 et seq.

2 See PARAS 434, 496. As to the right of common of pasture appendant see PARAS 433-438.

3 See Co Litt 122a; *Tyrringham's Case* (1584) 4 Co Rep 36b; Com Dig, Common, L. As to common of pasture in gross see PARAS 446-447.

4 As to the meaning of 'right of common' for registration purposes see PARA 405.

5 As to the meanings of 'register of common land' and 'register of town or village greens' see PARA 424 notes 7, 12; as to registration of common land and rights of common see PARA 506 et seq; and as to land which may be registered in England and Wales as a town or village green under the Commons Act 2006 see s 15; and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 541.

6 See the Commons Act 2006 s 13(3) (not fully in force); and PARA 493.

7 See the Commons Act 2006 s 3(6) (not fully in force); and PARAS 493, 527.

8 See the Commons Act 2006 (Commencement No 4 and Savings) (England) Order 2008, SI 2008/1960, art 2(1)(a), (b). As to the pilot areas in England see PARA 467 text and notes 29-30.

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445. Effect of division of ownership of land.

At common law, where a right of common of pasture was appurtenant to a hereditament the ownership of which was divided, the right was divisible so as to appertain partly to one section and partly to the other of the divided hereditament; and, in the absence of special circumstances, the right was apportioned rateably between the area of the part which was alienated and that which was retained¹. The Commons Act 2006 now prohibits severance of the right of common from the land, subject to certain exceptions², and provides that where severance does take place the right must be apportioned rateably³.

1 *White v Taylor (No 2)* [1969] 1 Ch 160, [1968] 1 All ER 1015.

2 See the Commons Act 2006 s 9, Sch 1; and PARAS 498-501.

3 See the Commons Act 2006 s 9(5); and PARA 498.

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C. COMMON OF PASTURE IN GROSS

446. Nature of right.

Common of pasture in gross is so called 'for that it appertaineth to no land, and must be by writing or prescription'¹. It is neither appendant nor appurtenant to land², but is a separate inheritance, entirely distinct from any landed property, and may be vested in one who owns no land at all³. It might be acquired by grant or prescription⁴; but the Commons Act 2006 provides that no new rights of common may be created over registered common land by prescription, or by express grant unless the rights are attached to that land⁵. At the date at which this volume states the law, that restriction was in force only in relation to the pilot areas in England⁶.

Common of pasture appurtenant for a number certain⁷ could always be severed from the land, and then became a right of common in gross, and it is in this form that common of pasture in gross is most frequently found⁸. The Commons Act 2006 now prohibits further severance, subject to certain limited exceptions⁹. That Act also provides:

- 67 (1) for a mechanism whereby registered rights in gross can become attached to land¹⁰; and
- 68 (2) that the transfer of a right of common in gross must comply with formalities prescribed by that Act¹¹;

but at the date at which this volume states the law, the provisions referred to in heads (1) and (2) above were in force only in relation to the pilot areas in England¹².

1 Co Litt 122a.

2 As to the right of common of pasture appendant see PARAS 433-438; and as to the right of common of pasture appurtenant see PARAS 439-445.

3 2 Bl Com 34.

4 *Tyrringham's Case* (1584) 4 Co Rep 36b. It could only be prescribed for by persons or bodies capable of taking by grant: *Boteler v Bristow* (1475) YB 15 Edw 4, fols 32 b, 33; and see *Parry v Thomas* (1850) 5 Exch 37.

As to the difficulties of prescribing for rights of common since the coming into effect of the Commons Registration Act 1965 see Gadsden *The Law of Commons* (1988) pp 126-131. The Commons Act 2006 prohibits the creation of new rights by prescription: see note 5.

5 See the Commons Act 2006 s 6(1), (3) (not fully in force); and PARAS 593-594.

6 See the Commons Act 2006 (Commencement No 4 and Savings) (England) Order 2008, SI 2008/1960, art 2(1)(b). As to the pilot areas see PARA 467 text and notes 29-30.

7 Where appurtenant grazing rights are registered, those rights which were formerly limited by levancy and couchancy become a right to graze a fixed number of animals as noted on the register: see *Bettison v Langton* [2001] UKHL 24, [2002] 1 AC 27, [2001] 3 All ER 417; and PARA 447. As to registration see PARA 508 et seq.

8 See *Bunn v Channen* (1813) 5 Taunt 244; *Lincoln Corpn v Holmes Common Overseers* (1867) LR 2 QB 482; and see PARA 442 note 10.

9 See the Commons Act 2006 s 9, Sch 1; and PARAS 498-501.

10 See the Commons Act 2006 s 10 (not fully in force); and PARA 523.

11 See the Commons Act 2006 s 12 (not fully in force); and PARA 525.

12 See the Commons Act 2006 (Commencement No 4 and Savings) (England) Order 2008, SI 2008/1960, art 2(1)(b).

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447. Quantification on registration.

Common of pasture in gross was formerly either for a number certain or sans nombre, which did not mean without limit¹. The conclusion to be drawn from the authorities with reference to common of pasture in gross sans nombre is that it was a right possible in law, but one which in fact very rarely existed². The authorities, however, on which this possibility in law rests, show that a right of common of pasture in gross sans nombre was limited to a right to turn on so many cattle as the common would maintain beyond the levant and couchant cattle of the owner of the soil and the commoners³.

The Commons Registration Act 1965 required grazing rights⁴ to be registered⁵, and rights of common of pasture in gross became a right to graze a fixed number of animals as noted on the register⁶. Under the Commons Act 2006, an application to record a variation of a right of common consisting of a right to graze any animal must be refused if in the opinion of the commons registration authority⁷ the land over which the right is exercisable would be unable to sustain the exercise of that right once varied, taken with any other rights exercisable over that land⁸.

1 See PARA 441 note 2. 'A claim of common sans nombre cannot mean a claim of feeding for innumerable beasts, but for a number not certain' (YB 11 Hen 6, 22b, per Babington CJ). See also *Mellor v Spateman* (1669) 1 Saund 339, 343 (where it was held that a corporation might prescribe for common in gross for cattle levant and couchant within the town, but not for common in gross without number, on the ground that otherwise the corporation might surcharge the common).

2 See *Saye's Case* (1641) March 83; *Mellor v Spateman* (1669) 1 Saund 339, 343; *Staples v Mellor* (1679) 2 Lev 246; *Stamford v Burgess* (1675) Sheppard's Abridgment 381.

3 Cooke's Inclosure Acts (4th Edn) 27; and see Elton on Commons 79. Some of the cases where the existence of common in gross sans nombre has been discussed appear to have related rather to separate properties in herbage vested in the corporation of a borough which was wrongly described in pleadings as a common: see *Mellor v Spateman* (1669) 1 Saund 339, 343; *Staples v Mellor* (1679) 2 Lev 246; cf *Beadsworth v Torkington* (1841) 1 QB 782; *Benson v Chester* (1799) 8 Term Rep 396.

4 As to the meaning of 'grazing rights' see *Besley v John* [2003] EWCA Civ 1737, [2003] 43 LS Gaz R 33, [2003] All ER (D) 481 (Oct), cited in PARA 435 note 2.

5 See the Commons Registration Act 1965 s 15; and PARA 435. As to registration see PARA 508 et seq.

6 See *Bettison v Langton* [2001] UKHL 24, [2002] 1 AC 27, [2001] 3 All ER 417.

7 As to the commons registration authorities see PARA 507.

8 See the Commons Act 2006 s 7(5) (not fully in force); and PARA 522.

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D. COMMON OF PASTURE BY REASON OF VICINAGE

448. Nature of right.

Common of pasture by reason of vicinage exists where the commonable beasts belonging to the inhabitants of one town or manor have been accustomed time out of mind¹ to stray into the fields or wastes of an adjoining town or manor without molestation². The right must have existed from time immemorial³, or for a period which the law accepts as proof that it has so existed⁴.

It has been said not to be a right, but only an excuse for trespass⁵. The principle on which common of pasture by reason of vicinage rests is that the parties interested in the respective lands over which it is claimed have for their mutual benefit acquiesced in the practice. It might be claimed by prescription⁶, but is rather a matter of immemorial custom⁷. The substance of the custom is that cattle⁸ lawfully on one common have been used to stray upon the other, and the right does not extend to the turning of cattle on the neighbouring common, but only to the allowing of cattle originally turned upon the home common to stray upon the other⁹. The right is also subject to the limitation that the commoners of neither of the commons may turn out on their common more beasts than their own common will feed¹⁰. It is necessary, therefore, to allege in support of the claim that the cattle were lawfully on their own common before they strayed, which can be done by showing 30 years' user under the Prescription Act 1832, and to allege and prove the custom to stray¹¹. Where cattle are pastured over adjoining commons with uncertain boundaries, it is a question of fact whether the pasturage is in exercise of a right of common by reason of vicinage or is attributable to a mistake of the boundary¹².

Rights of common of pasture by reason of vicinage required registration under the Commons Registration Act 1965¹³, at which time the number of cattle to which the right applied was to be quantified¹⁴. Where such rights have not been registered they are no longer exercisable¹⁵. Under the Commons Act 2006, an application to record a variation of a right of common consisting of a right to graze any animal must be refused if in the opinion of the commons registration authority¹⁶ the land over which the right is exercisable would be unable to sustain the exercise of that right once varied, taken with any other rights exercisable over that land¹⁷.

Two private owners of estates may have a right of interpasturing. It is not a necessity that there should be commoners on both sides in order to give validity to a claim of common of pasture by reason of vicinage, though, where such common exists, most frequently there are commoners¹⁸.

1 le since beyond the time of legal memory, or 1189: see PARA 433 text and note 5.

2 See 2 Bl Com 33; *Sewers Comrs v Glasse* (1874) LR 19 Eq 134 at 160 per Jessel MR.

3 *Tyrringham's Case* (1584) 4 Co Rep 36b at fo 38a per Wray CJ; and see Cooke's Inclosure Acts (4th Edn) 31.

4 See PARA 470 et seq.

5 Co Litt 122a.

6 See *Pritchard v Powell* (1845) 10 QB 589, and authorities there cited. See also *Newman v Bennett* [1981] QB 726, [1980] 3 All ER 449 (vicinage is a right of common although it is not a separate right but a means

whereby a commoner can obtain rights of pasture over another piece of land). As to the Prescription Act 1832 see PARA 473. It is doubtful if any new rights of common of pasture by reason of vicinage can now be created; and the Commons Act 2006, once fully in force, will prohibit the creation of any rights by prescription: see s 6(1) (not fully in force); and PARA 467.

7 *Jones v Robin* (1847) 10 QB 620, Ex Ch; *Clarke v Tinker* (1845) 10 QB 604, and the earlier authorities referred to in that case.

8 As to the meaning of 'cattle', and as to the animals in respect of which rights of common may be exercised, see PARA 436 note 1.

9 Co Litt 122a; *Jones v Robin* (1847) 10 QB 620; *Clarke v Tinker* (1845) 10 QB 604; *Pritchard v Powell* (1845) 10 QB 589; *Sewers Comrs v Glasse* (1874) LR 19 Eq 134.

10 *Corbet's Case* (1585) 7 Co Rep 5a; and see *Pritchard v Powell* (1845) 10 QB 589; *Sewers Comrs v Glasse* (1874) LR 19 Eq 134 at 161 per Jessel MR.

11 See *Pritchard v Powell* (1845) 10 QB 589 at 603 per Denman CJ. In this case it was decided, on the authority of *Weeks v Sparke* (1813) 1 M & S 679, that where an enjoyment in fact has been shown, evidence of reputation may be given to prove an immemorial common of vicinage between two commons, the right, though in some sense private, being, as respects the number of persons affected by it, public and therefore a matter of notoriety.

12 *Hetherington v Vane* (1821) 4 B & Ald 428.

13 As to the requirement of registration see PARA 403.

14 As to quantification on registration see the Commons Registration Act 1965 s 15; and PARAS 435, 441, 447.

15 See PARA 403 note 8.

16 As to the commons registration authorities see PARA 507.

17 See the Commons Act 2006 s 7(5) (not fully in force); and PARA 522.

18 Such a claim in a private estate must be by prescription, and not by custom: see *Jones v Robin* (1847) 10 QB 620 at 635, and authorities there cited. Such a right where there are no commoners would probably be an ordinary profit and not a right of common at all.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/2. RIGHTS OF COMMON AND RELATED RIGHTS/(1) DESCRIPTIONS OF RIGHTS/(ii) Common of Pasture and Related Rights/D. COMMON OF PASTURE BY REASON OF VICINAGE/449. Necessity for contiguity and mutuality.

449. Necessity for contiguity and mutuality.

The right of common of pasture by reason of vicinage can only exist between contiguous wastes; where A, B and C are three towns with commons, B lying between A and C, there can be common of vicinage between A and B and between B and C, but not between A and C; and it appears that there cannot be common of vicinage between more than two townships¹.

The right must be mutual between the commoners or owners of the two commons. A mere rambling of stock from downs over which there are rights of common of pasture into downs of which the owner is in exclusive possession cannot be justified under common of pasture by reason of vicinage². Also the intercommoning must take place at the same time: if one township has common in another during one season of the year, and the other has common in the first during another season of every second year, that is not common of pasture by reason of vicinage³.

¹ See *Bromfeild v Kirber* (1706) 11 Mod Rep 72 at 73 per Holt LJ; *Sewers Comrs v Glasse* (1874) LR 19 Eq 134 at 159-160, where the authorities are discussed by Jessel MR.

² *Heath v Elliott* (1838) 4 Bing NC 388.

³ *Anon* (1540) Dyer 47b per Baldwin J; *Clarke v Tinker* (1845) 10 QB 604.

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450. Destruction of right.

The right of common of pasture by reason of vicinage can only exist between commons lying open the one to the other, and might at any time be destroyed at common law by a division of the two commons by such a fence as would keep out cattle¹. This division, however, must be complete². The Commons Act 2006 now provides that a right of common³ which is registered in a register of common land or town or village greens⁴ cannot be extinguished by operation of common law⁵ and can only be removed from the registers as provided by statute⁶. At the date at which this volume states the law, these provisions were in force only in relation to the pilot areas in England⁷.

The passing of an Inclosure Act⁸, and an award under the Act putting an end to the rights of common over one common, did not of themselves put an end to rights of common by reason of vicinage which previously existed⁹. When the inclosure was completed, and the adjoining common completely fenced off, the right ceased.

1 *Jones v Robin* (1847) 10 QB 620. As to the meaning of 'cattle', and as to the animals in respect of which rights of common may be exercised, see PARA 436 note 1.

2 Where one of two adjoining commons with common vicinage was inclosed and fenced off by the owner of the soil, but a passage was left open sufficient for the highway leading over the one to the other, so that the cattle could stray from one to the other, the common of vicinage was not destroyed: *Gullett v Lopes* (1811) 13 East 348; and see *Conway's Case* (1572) 3 Dyer 315b.

3 As to the meaning of 'right of common' for registration purposes see PARA 405.

4 As to the meanings of 'register of common land' and 'register of town or village greens' see PARA 424 notes 7, 12; as to registration of common land and rights of common see PARA 506 et seq; and as to land which may be registered in England and Wales as a town or village green under the Commons Act 2006 see s 15; and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 541.

5 See the Commons Act 2006 s 13(3) (not fully in force); and PARA 493.

6 See the Commons Act 2006 s 3(6) (not fully in force); and PARAS 493, 527.

7 See the Commons Act 2006 (Commencement No 4 and Savings) (England) Order 2008, SI 2008/1960, art 2(1)(a), (b). As to the pilot areas in England see PARA 467 text and notes 29-30.

8 As to the Inclosure Acts and inclosure see generally PARA 418 et seq; and as to the use of the terms 'inclose', 'inclosure' etc see PARA 418 note 2.

9 *Wells v Percy* (1835) 1 Bing NC 556; *Clarke v Tinker* (1845) 10 QB 604.

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451. Alternative claims to common appendant or appurtenant.

The right of common of pasture by reason of vicinage has many points of resemblance to a right of common appendant or appurtenant¹, and when a user of common is claimed by reason of vicinage, but offends in some of its circumstances against the rules relating to vicinage, it may be found that such user, though bad as a common of vicinage, may be good as a common appendant or as a common appurtenant².

All such rights, however, now require registration³, which has greatly reduced the significance of the traditional distinctions between them.

1 As to the right of common of pasture appendant see PARAS 433-438; and as to the right of common of pasture appurtenant see PARAS 439-445.

2 See Cooke's Inclosure Acts (4th Edn) 33; and see also *Hollinshead v Walton* (1806) 7 East 485 (where it was held that the owner of a tenement may have two distinct rights of common for his cattle levant and couchant upon such tenement upon different wastes in different manors under several lords; and therefore an allotment under one Inclosure Act in lieu of his right of common upon one of such wastes did not do away with or lessen his claim for an equal allotment with other commoners under a subsequent Act for inclosing the other waste (though would appear to be otherwise if the different wastes had been originally held under the same lord)). As to the Inclosure Acts and inclosure see generally PARA 418 et seq. As to the use of the terms 'inclose', 'inclosure' etc see PARA 418 note 2.

3 See PARA 403. As to registration see PARA 506 et seq.

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E. RIGHT OF SOLE OR SEVERAL VESTURE AND HERBAGE AND OF SOLE OR SEVERAL PASTURE

452. Rights not strictly rights of common.

The rights of pasture which have been so far described¹ are rights of common, that is to say, rights of pasturage which are exercised in common with, and without excluding, the owner of the soil; but other rights are frequently found to exist over commons and commonable lands which, without giving any interest in the soil, exclude the owner of the soil from all enjoyment of some particular product of the soil. They are therefore not strictly speaking rights of common, though for practical purposes they are of that nature².

These rights, which are various, may be classified according to the extent of the produce taken as rights of sole or several vesture and herbage, or rights of sole or several pasture. Such rights are included in the statutory definitions of 'right of common' for the purposes of the Commons Registration Act 1965 and the Commons Act 2006³. Each right may be enjoyed either during the whole year or for a limited period, and while they are enjoyed exclude the owner of the soil from any enjoyment of the particular right⁴.

¹ The common of pasture appendant (see PARAS 433-438), common of pasture appurtenant (see PARAS 439-445), common of pasture in gross (see PARAS 446-447), and common of pasture in vicinage (see PARAS 448-451).

² Co Litt 122a; and see Hunter's Preservation of Open Spaces, Footpaths, and Other Rights of Way (2nd Edn) 79.

³ See the Commons Registration Act 1965 s 22(1); the Commons Act 2006 s 61(1); and PARA 405.

⁴ Co Litt 4b, 122a; *Dowglas v Kendal* (1610) Cro Jac 256. In many cases there is little doubt that cattlegates (as to which see PARA 417) are in the nature of a sole pasture, the owner of the soil being excluded from any right to the pasture: *Rigg v Earl of Lonsdale* (1857) 1 H & N 923.

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453. Rights by grant or prescription.

Rights of sole or several vesture and herbage, and rights of sole or several pasture, may be claimed either by an actual grant or by prescription¹, and consequently by user which will establish a claim by prescription either at common law or by lost grant or under the Prescription Act 1832². It should be borne in mind that, in order to establish a claim under the Act, it is only necessary to show that the benefit claimed has been enjoyed by the claimant for the requisite period as of right, and not by permission, and that the right claimed is one which could have a legal origin by custom, prescription, or grant, although the claimant may have proceeded upon a mistaken idea as to the nature of his right³. All such rights, unless held for a term of years or from year to year, are now subject to the requirement of registration⁴ and if not registered they are not exercisable⁵.

The Commons Act 2006 prohibits the creation of any such new rights by prescription⁶.

1 Co Litt 4b, 122a. However, doubts have been expressed as to the availability of prescription since the enactment of the Commons Registration Act 1965: see Gadsden *The Law of Commons* (1988) pp 126-131. See also the text and note 6.

2 See PARA 470 et seq.

3 See *Earl De la Warr v Miles* (1881) 17 ChD 535, CA (where the defendant was able to prove open enjoyment of a right to cut and carry away litter for a lengthened period, but had always exercised the right under the mistaken idea that he and other commoners were entitled to do so under a decree). For a similar case concerning easements see *Bridle v Ruby* [1989] QB 169, [1988] 3 All ER 64, CA. The subjective belief of the users is irrelevant for the purpose of user as of right: *R v Oxfordshire County Council, ex p Sunningwell Parish Council* [2000] 1 AC 335, [1999] 3 All ER 385, HL.

4 See PARA 405 (meaning of 'rights of common' for registration purposes).

5 See PARA 403.

6 See the Commons Act 2006 s 6(1) (not fully in force); and PARA 467.

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454. Sole vesture.

The right of sole vesture extends to the enjoyment of the corn, grass, underwood, sweepage¹, and the like, but not to houses, timber, trees, or mines, or in any way to the land itself. Those who enjoy it may bring a claim of trespass against anyone entering upon the land², and may let the vesture reserving a rent³.

A prescription to take all of a particular product, such as all the thorns growing upon certain land, is good⁴. It is clear, therefore, that the right will include many of the products which, if a right of common existed, would come under the heads of turbary and estovers⁵.

1 le all that comes in the sweep of the scythe.

2 Co Litt 4b.

3 Co Litt 47a. Such a licence or letting must be by deed: *Monk v Butler* (1620) Cro Jac 574; *Hoskins v Robins* (1671) Poll 13.

4 *Dowglas v Kendal* (1610) Cro Jac 256.

5 As in *R v Warkworth Inhabitants* (1813) 1 M & S 473 (where the freemen of Alnwick had the right, in addition to pasturage rights, to dig and cut peat, furze, turves, and bushes for their own use, and to get limestone, slates, and freestone in the open quarries on the moor, and these rights were expressly held not to be rights of common). As to common of turbary and common of estovers see PARAS 457-460.

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455. Sole and several pasture.

Sole pasture is not so wide as sole vesture, being the right to take everything growing on the land by the mouths of the cattle¹ of the persons entitled, but not otherwise. A right of sole pasture may exist during the whole year², or during part only of the year³. Even where the right exists during the whole year it does not exclude the owner of the soil from all the profits of the land, and he remains entitled to the trees and quarries. Sole common of pasture means a right of pasture for commoners sole as against the owner of the soil, but in common between themselves⁴. The exclusive right of pasture is frequently vested in a corporation for the benefit of the burgesses, inhabitants, householders, etc of a town⁵.

As the owner of the soil is excluded from the pasturage either for the whole year or for the period during which the right exists, it was formerly held that the owners of the right were under no restrictions as to the cattle they turned out, except such as they or their predecessors might have made; they were not confined to cattle levant and couchant⁶ upon their own lands, and the rights could be let or agisted⁷. Further, it has been suggested that the joint owners of the surface or pasture could have the right of feeding an unlimited number of cattle⁸; but a measure was usually provided either by byelaws⁹ or by the custom or usage which gave the property in the herbage¹⁰.

As a right of common for the purposes of the Commons Registration Act 1965 and the Commons Act 2006¹¹, however, the right of sole or several pasture is now subject to registration if it is to be exercisable¹² and is thus limited to the numbers of animals specified in the register¹³. Under the Commons Act 2006, the creation of a new right of common¹⁴ consisting of a right to graze animals is not to be registered if in the opinion of the commons registration authority¹⁵ the land over which the right is exercisable would be unable to sustain the exercise of that right taken with any other rights exercisable over that land¹⁶; and similar restrictions apply to the variation of any such right of common¹⁷.

1 As to the meaning of 'cattle', and as to the animals in respect of which rights of common may be exercised, see PARA 436 note 1.

2 *Hoskins v Robins* (1671) Poll 13; *R v Warkworth Inhabitants* (1813) 1 M & S 473; and see *Potter v North* (1669) 1 Vent 383 at 395; *Jones v Richard* (1837) 6 Ad & El 530; *Welcome v Upton* (1840) 6 M & W 536. This proposition was once doubted: *North v Cox* (1668) 1 Lev 253.

3 *Cox v Glue* (1848) 5 CB 533; and cf *Wright v Hobert* (1723) 9 Mod Rep 64.

4 *Earl De la Warr v Miles* (1881) 17 ChD 535 at 587, CA.

5 See *R v Churchill* (1825) 4 B & C 750 (the corporation of Nottingham for the burgesses); *Johnson v Barnes* (1873) LR 8 CP 527 (the corporation of Colchester for the free burgesses, limited by a byelaw of the corporation in the reign of Elizabeth I to three head of great cattle or ten sheep for each burgess); *R v Tewkesbury (Trustees for Burgesses)* (1810) 13 East 155 (a common vested in trustees under an Inclosure Act where, before the passing of the Act, the resident burgesses and the occupiers of certain houses in the borough were entitled to rights of common for their cattle); *R v Watson* (1804) 5 East 480 (the corporation of Huntingdon seised in fee of common lands which by custom were annually stocked by resident burgesses who desired to stock, according to a stint fixed by a leet jury (burgesses) under the control of the mayor, those who did not stock receiving a money payment provided by those who did); *Cox v Glue* (1848) 5 CB 533 (land at Derby held in fee and the owners entitled to the forecrop and possession from 14 February to 6 July in each year, the burgesses and freemen of the borough of Derby having exclusive possession during the remainder of the year for turning thereon horses, cows, sheep and calves). See also note 8.

6 As to levancy and couchancy see PARA 433 note 2.

7 *Hoskins v Robins* (1671) Poll 13. See also *Welcome v Upton* (1840) 6 M & W 536 (which decided that a sole and several herbage and pasturage in gross which had been proved to exist might be assigned as a valuable interest and demised).

8 See Elton on Commons 38, quoting *Revell v Jodrell* (1788) 2 Term Rep 415; *Benson v Chester* (1799) 8 Term Rep 396; and *Ivatt v Mann* (1842) 4 Scott NR 342 (but the first-mentioned case is no authority on the subject, which is not referred to in it). The case of *Mellor v Spateman* (1669) 1 Saund 339, 343, was treated by the court as a case of common in gross (as to which see PARAS 446-447) vested in the corporation of Derby for the benefit of the burgesses, and it was held that the prescription must be for cattle levant and couchant within the town; but it is not improbable that the right was one of sole pasturage. See *Johnson v Barnes* (1873) LR 8 CP 527 at 532 per Blackburn J, discussing *R v Churchill* (1825) 4 B & C 750 (where a right of sole pasturage was spoken of as a right of common). If this theory that the right was one of sole pasturage be correct, *Mellor v Spateman* (1669) 1 Saund 339 would be an authority against the proposition that the right can be unlimited; but as to quantification on registration see the text and notes 11-13.

9 See *James v Tutney* (1638) Cro Car 497; *Earl of Excester v Smith* (1668) 2 Keb 367; and see PARAS 586, 593.

10 See *Kentick v Pargiter* (1608) Cro Jac 208, where a custom was proved for the tenants of a manor to have the sole pasturage of land from Lammas day, after which the lord was restricted in the number of cattle he could turn out and a commoner was justified in distraining any surcharge.

11 See PARA 405.

12 See PARA 403.

13 See the Commons Registration Act 1965 s 15; PARAS 435, 441; and *Bettison v Langton* [2001] UKHL 24, [2002] 1 AC 27, [2001] 3 All ER 417. As to registration see PARA 508 et seq.

14 As to the creation of new rights of common see the Commons Act 2006 s 6 (not fully in force); and PARAS 467, 469.

15 As to the commons registration authorities see PARA 507.

16 See the Commons Act 2006 s 6(6) (not fully in force); and PARA 467.

17 See the Commons Act 2006 s 7(5) (not fully in force); and PARA 522.

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456. Rights of owner of soil otherwise unaffected.

The fact that other persons have an exclusive right to depasture cattle¹ during a part of a year and to exclusive possession during that time does not prevent the owner in fee simple of the land from suing for damage to the subsoil done by a stranger at a time when the persons exercising the right have possession of the surface². Nor does it prevent the owner of the land from exercising his sporting rights³.

1 As to the meaning of 'cattle', and as to the animals in respect of which rights of common may be exercised, see PARA 436 note 1.

2 *Cox v Glue* (1848) 5 CB 533 (where the rights of the owner in such circumstances are fully considered).

3 *Brackenbank Lodge v Peart* [1996] NPC 124, (1996) Times, 26 July, HL.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/2. RIGHTS OF COMMON AND RELATED RIGHTS/(1) DESCRIPTIONS OF RIGHTS/(iii) Common of Turbary/457. Nature of right.

(iii) Common of Turbary

457. Nature of right.

Common of turbary is a right of digging turf or peat in another person's ground for fuel in the commoner's house. It resembles common of estovers¹ in almost all its incidents, so that the cases relating to the one right are frequently quoted and treated as authorities concerning the nature of the other². The rights may be claimed by prescription in respect of an ancient messuage³, or as appurtenant to a new house erected in continuance of the ancient messuage, provided no greater burden is placed upon the servient land; it is not necessary that the new house should be built on the foundations of the ancient house⁴. They may also, of course, be claimed as appurtenant to a modern house if there is a specific grant. The rights pass under a grant of a house and its appurtenances⁵. Where the rights are limited to a specific quantity, they may also be rights of common in gross⁶. They cannot, however, exist by reason of vicinage, as the circumstances which allow common of vicinage do not apply⁷.

Whether the rights can be appendant is a matter of doubt; some authorities assert that they can⁸, but later writers consider that only common of pasture can be appendant⁹.

The right of common of turbary now requires registration¹⁰ in order to be exercisable¹¹.

1 See PARAS 459-460.

2 For a review of the authorities relating to common of turbary see *A-G v Reynolds* [1911] 2 KB 888.

3 Inhabitants and occupiers (being tenants at will) cannot prescribe for a right of common of turbary (*Dean and Chapter of Ely v Warren* (1741) 2 Atk 189; *Wilkinson v Haygarth* (1847) 12 QB 837; and see PARA 472), but it has been said that a freeman may have a right to take turves for his own use (*R v Warkworth Inhabitants* (1813) 1 M & S 473 (where, however, some at least of the rights claimed were held not to be rights of common)). Ancient freeholders of a manor could prescribe for the right (*Warrick v Queen's College, Oxford* (1871) 6 Ch App 716), and a mayor and burgesses may prescribe to have such a right of common for themselves and the inhabitants of the town (*White v Coleman* (1673) Freem KB 134. Cf *R v Warkworth Inhabitants* (1813) 1 M & S 473).

As to the difficulties of claiming prescriptive rights following the enactment of the Commons Registration Act 1965 see Gadsden *The Law of Commons* (1988) pp 126-131. The Commons Act 2006 prohibits the creation of new rights of common by prescription: see s 6(1) (not fully in force); and PARA 467.

4 See *A-G v Reynolds* [1911] 2 KB 888. As to rights of common appurtenant see PARAS 439-445.

5 *Solme v Bullock* (1684) 3 Lev 165.

6 See *Brown and Tucker's Case* (1610) 4 Leon 241; Cooke's Inclosure Acts (4th Edn) 37 (estovers). As to rights of common in gross see PARAS 446-447.

7 As to rights in vicinage see PARAS 448-451.

8 See Woolrych on Rights of Common (2nd Edn) 76; Cooke's Inclosure Acts (4th Edn) 35; Co Litt 121b.

9 See Elton on Commons 88. As to common of pasture appendant see PARAS 433-438.

10 See PARA 403.

11 See PARA 403 text and note 8.

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458. Extent of right.

Common of turbary from its nature can only extend to grounds capable of producing fuel¹. The right may be either a right to take turves or peat from a peat moss or marshy ground or a right of paring the surface². Sometimes a right is claimed of paring the turf³, but where the turf is fit for pasture this practice is of doubtful legality. The turves must be expended on the premises to which the right is appendant or appurtenant, and this is so even though the quantity is certain⁴.

A claim in respect of a tenement to cut and sell turf is bad⁵; and a custom to take turves covered with grass to be spent upon the tenement of the copyholders for the purpose of making and repairing grass plots in their gardens and for improvements therein was held to be unreasonable and uncertain⁶.

1 *Peardon v Underhill* (1850) 16 QB 120.

2 See *Elton on Commons* 96-97. The right of paring the surface is exercised on dry heaths.

3 See *Lady Wilson v Willes* (1806) 7 East 121; and cf *Robertson v Hartopp* (1889) 43 ChD 484, CA (though in that case the property over which the right was claimed included a good deal of heath land).

4 *Hayward v Cunnington* (1668) 1 Lev 231 (where the right was to take as much turf as two men could dig in one day).

5 *Valentine v Penny* (1605) Noy 145.

6 *Lady Wilson v Willes* (1806) 7 East 121 at 127-128 per Lord Ellenborough CJ.

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(iv) Common of Estovers

459. Nature of right.

Common of estovers (sometimes known as 'botes') is the profit which a person has in the soil of another to cut or prune from his forest, or other wastes, wood for his building, enclosing and firing or other necessary purposes¹; it resembles common of turbary² in almost all its incidents. The right is not lost if the house is rebuilt³, but if the house is enlarged, the estovers cannot be employed or spent in the part newly added, for that would increase the burden on the servient land. If the character of the right was altered so as to increase that burden, as, for instance, by converting a hall into a kitchen or malthouse, at common law the right was lost⁴.

Where the quantity of the product to be taken is certain there are conflicting views on whether or not the right can exist in gross⁵ and whether or not it might formerly be severed from the land to which it is appurtenant⁶. Severance of all quantified rights of common is now, subject to certain exceptions⁷, prohibited by the Commons Act 2006⁸.

The rules which apply with respect to common of turbary to the effect that the right can only be claimed by persons capable of taking under a grant⁹ apply equally to common of estovers¹⁰.

The right of common of estovers now requires registration¹¹ in order to be exercisable¹².

1 Bract 136.

2 As to common of turbary see PARAS 457-458.

3 *A-G v Reynolds* [1911] 2 KB 888; and see PARA 457.

4 *Luttrell's Case* (1601) 4 Co Rep 84 b; *Brown and Tucker's Case* (1610) 4 Leon 241; and see other cases to the same effect referred to in Hall's Profits à Prendre 321-323. See now, however, the Commons Act 2006 s 13(3); and PARA 497 note 6.

5 As to rights in gross see PARAS 446-447.

6 See PARA 497 note 12. The right cannot, however, exist at law in undivided shares: see the Law of Property Act 1925 ss 1(6), 34-39, 205(1)(ix); and **REAL PROPERTY**.

7 See the Commons Act 2006 Sch 1; and PARAS 499-501.

8 See the Commons Act 2006 s 9; and PARA 498.

9 See PARA 472.

10 See *Selby v Robinson* (1788) 2 Term Rep 758; *Willingale v Maitland* (1866) LR 3 Eq 103; *Chilton v London Corp'n* (1878) 7 ChD 735 (the last two cases relating to the right of 'lopwood' for fuel in Epping Forest); *Warrick v Queen's College, Oxford* (1871) 6 Ch App 716 (right to take turf, furze and gorse); but see *Rackham v Jesup and Thomson* (1772) 3 Wils 332 (custom for the inhabitants of T to cut rushes on T common held to be good). Cf *Lord Rivers v Adams* (1878) 3 ExD 361 (right to cut and carry away underwood; necessity for Crown grant incorporating inhabitants); and PARA 472.

11 See PARA 403.

12 See PARA 403 text and note 8.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/2. RIGHTS OF COMMON AND RELATED RIGHTS/(1) DESCRIPTIONS OF RIGHTS/(iv) Common of Estovers/460. Limitation as to kind and amount of materials.

460. Limitation as to kind and amount of materials.

Unless the right claimed is for the repair of a house, the commoner, as a rule, is confined to the taking of underwood, shrubs, or loppings, or trees of little value, such as birch, willow, and alder¹, but the right to cut down oaks may sometimes be vested in him². In many cases the common must not be used except in places marked out by the owner of the waste or his bailiff, and the commoner will be liable for trespass if he takes any estovers without supervision where such a restriction exists³.

Estovers may also extend to taking gorse, heather, fern, or bracken, and similar growths. They do not extend strictly to fodder for cattle⁴, but the right to take heather, fern, or bracken, and long grass, that can be mown or cut for litter, was established in several cases during the nineteenth century⁵.

A claim to estovers, in order to be valid, must be made with some limitation or restriction, either by reference to the necessities of the tenement in respect of which it is claimed⁶, or by defining the quantity of the profit to be taken, as, for instance, a right to take so many cartloads of fuel⁷. The estovers taken must be spent upon the premises which give the right to take them, and, unless the quantity to be taken is fixed, cannot be used independently of those premises⁸. Thus, except possibly where the quantity is certain, they are inseparable from the premises which gave the right to them, and under a grant to a tenant for life of sufficient estovers to be burnt in a house the right will pass with the house to the remainderman⁹.

The right can only be exercised on such parts of the waste as are capable of producing the necessary product¹⁰.

The right to take the whole of a particular product, as all the thorns growing on a particular waste, though it may be established, is not a right of common, but an exclusive right of the same nature as a sole or several pasture¹¹.

1 Bac Abr, Common, A; *Anon* (1572) 3 Leon 16; and cf *Earl De la Warr v Miles* (1881) 17 ChD 535, CA.

2 *Russel and Broker's Case* (1587) 2 Leon 209.

3 Elton on Commons 86; and cf 2 Co Inst 411; Manwood's Forest Laws (5th Edn) 133. See *Re Turnworth Down, Dorset* [1978] Ch 251, [1977] 2 All ER 105 (control on the cutting of furze to be exercised by Steward and Homage of the Court Baron).

4 As to the meaning of 'cattle', and as to the animals in respect of which rights of common may be exercised, see PARA 436 note 1.

5 *Smith v Earl Brownlow* (1870) LR 9 Eq 241; *Warrick v Queen's College, Oxford* (1871) 6 Ch App 716; *Earl De la Warr v Miles* (1881) 17 ChD 535, CA; *Hollinshead v Walton* (1806) 7 East 485; *Robertson v Hartopp* (1889) 43 ChD 484, CA.

6 *Clayton v Corby* (1843) 5 QB 415 at 419-420 per Lord Denman CJ. Cf *Lord Chesterfield v Harris* [1908] 2 Ch 397 at 410-411, CA, per Cozens-Hardy MR.

7 See *Earl De la Warr v Miles* (1881) 17 ChD 535, CA.

8 *Earl Pembroke's Case* (1636) Clay 47.

9 *Syms' Case* (1608) 8 Co Rep 51a at fo 54a. As to severance see PARA 497; but note that if quantified the right cannot be severed (see the Commons Act 2006 s 9; and PARA 498).

10 *Peardon v Underhill* (1850) 16 QB 120.

11 *Dowglas v Kendal* (1610) Cro Jac 256; cf *R v Warkworth Inhabitants* (1813) 1 M & S 473; *Bean v Bloom* (1773) 2 Wm Bl 926. As to the rights of sole or several pasture see PARAS 452-456.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/2. RIGHTS OF COMMON AND RELATED RIGHTS/(1) DESCRIPTIONS OF RIGHTS/(v) Common of Piscary/461. Nature of right.

(v) Common of Piscary

461. Nature of right.

Common of piscary¹ is a right of fishing with other persons in another person's water, and does not differ from other rights of common². It may be either appurtenant or in gross³. It may be annexed to lands formerly copyhold of a manor, and in that case may be claimed by custom⁴, but in all other cases it must be based on grant or prescription⁵. The right may exist in common not only with other persons, but also with the owner of the soil.

Common of piscary being a profit à prendre and not an easement⁶, a custom for all the inhabitants of a parish to angle for, catch, and carry away fish is bad; and, even if limited to a claim to angle for and catch the fish, the custom would also be bad as equally destructive of the subject matter⁷.

The right of common of piscary now requires registration⁸ in order to be exercisable⁹.

1 Common of piscary must be distinguished from a free or a several fishery, which is not a right of common, but is an exclusive right of fishing from which the owner of the soil may be excluded, and in which the ownership of the soil is frequently in the ownership of the fishery. The distinction between the two rights is clearly drawn in *Malcomson v O'Dea* (1863) 10 HL Cas 593 at 619 per Willes J. See also *Lady Dunsany v Bedworth* (1979) 38 P & CR 546. As to the law as to fisheries in general see **AGRICULTURE AND FISHERIES**.

2 *Smith v Kemp* (1693) 2 Salk 637; *Lord Chesterfield v Harris* [1908] 2 Ch 397 at 412, CA, per Cozens-Hardy MR (affd on appeal sub nom *Harris v Earl of Chesterfield* [1911] AC 623, HL). See also the cases cited in the latter case.

3 Cooke's Inclosure Acts (4th Edn) 40 (where the author considers that it may also be appendant; but on this question see PARA 457 text and notes 8-9). As to the difficulties of claiming by prescription a right of piscary in gross see *Lovett v Fairclough* (1990) 61 P & CR 385.

4 *Tilbury v Silva* (1890) 45 ChD 98, CA. See further *Payne v Ecclesiastical Comrs and Landon* (1913) 30 TLR 167. As to the abolition of copyhold tenure see **REAL PROPERTY** vol 39(2) (Reissue) PARA 31 et seq.

5 *Lloyd v Jones* (1848) 6 CB 81; *Bland v Lipscombe* (1854) 4 E & B 713n; cf *Lord Fitzhardinge v Purcell* [1908] 2 Ch 139.

6 See **EASEMENTS AND PROFITS A PRENDRE** vol 16(2) (Reissue) PARA 256.

7 *Bland v Lipscombe* (1854) 4 E & B 713n; and see *Lloyd v Jones* (1848) 6 CB 81; *Allgood v Gibson* (1876) 34 LT 883; *Goodman v Saltash Corp'n* (1882) 7 App Cas 633 at 648, HL, per Cairns LC; cf *Lord Chesterfield v Harris* [1908] 2 Ch 397, CA (affd sub nom *Harris v Earl of Chesterfield* [1911] AC 623, HL). See also **CUSTOM AND USAGE** vol 12(1) (Reissue) PARA 631 et seq.

8 See PARA 403.

9 See PARA 403 text and note 8.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/2. RIGHTS OF COMMON AND RELATED RIGHTS/(1) DESCRIPTIONS OF RIGHTS/(v) Common of Piscary/462. Where right may exist.

462. Where right may exist.

Common of piscary can in general be exercised only in a pond, a lake or a river that is not navigable. It cannot exist in the sea or as a rule in a tidal navigable river¹ for in these there are public rights of fishing² unless a several fishery has been granted by the Crown before 1189 or by statute³.

1 *Ward v Creswell* (1741) Willes 265; and see Co Litt 122a, and Butler's note thereon as to several fishery, common of fishery and free fishery. Cf *Carter v Murcot* (1768) 4 Burr 2162 at 2164 per Lord Mansfield CJ. See also **AGRICULTURE AND FISHERIES**.

2 *A-G for British Columbia v A-G for Canada* [1914] AC 153 at 168, PC; and see **AGRICULTURE AND FISHERIES**.

3 See eg *Goodman v Saltash Corp* (1882) 7 App Cas 633, 47 JP 276, HL (several fishery held by a corporation in trust for local people). As to foreshore see **CROWN PROPERTY** vol 12(1) (Reissue) PARA 242 et seq.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/2. RIGHTS OF COMMON AND RELATED RIGHTS/(1) DESCRIPTIONS OF RIGHTS/(v) Common of Piscary/463. Extent of right.

463. Extent of right.

Where common of piscary is claimed by prescription as appurtenant to a house, the house in respect of which it is claimed must be an ancient house, or built upon the site of an ancient house, as in the case of common of estovers¹; and it would seem that the fish should be taken for use in the house to which the right is attached and not for sale². Where the right is appurtenant³ to a tenement, a claim to take an unlimited quantity for sale, though proved to have been exercised for three hundred years, cannot be supported⁴. The right must be exercised in a reasonable manner and according to the terms of the prescription or custom, which must be both reasonable and certain⁵.

Whether any commoner who has common of piscary has the legal right to sell the fish taken is doubtful, though the practice has prevailed in many places. The principles applicable to common of estovers and common of turbary⁶ would negative the right except possibly where the quantity to be taken is fixed⁷.

1 As to common of estovers see PARAS 459-460.

2 2 Bl Com 35, cited in *Clayton v Corby* (1843) 5 QB 415 at 420 per Denman CJ. See also *Lord Chesterfield v Harris* [1908] 2 Ch 397 at 410-411, CA (affd sub nom *Harris v Earl of Chesterfield* [1911] AC 623, HL), where Cozens-Hardy MR relied on *Clayton v Corby*, and on *Bailey v Stephens* (1862) 12 CBNS 91, to support the proposition that a claim to a profit à prendre in a 'que estate', or in other words a claim appurtenant to land, necessarily involves some relation between the needs of the estate or its owner and the extent of the profit à prendre, and that a right in an indefinite number of people to take a profit à prendre without stint and for sale must tend to the entire destruction of the property, and is bad; and cf *Edgar v English Fisheries Special Comrs* (1870) 23 LT 732.

3 See PARA 461.

4 *Lord Chesterfield v Harris* [1908] 2 Ch 397, CA; affd sub nom *Harris v Lord Chesterfield* [1911] AC 623, HL.

5 See PARA 470 et seq.

6 See PARAS 458, 460.

7 In Woodrych on Rights of Common (2nd Edn) 91 the opinion is given that the sale is possibly lawful where the quantity is fixed; but see PARA 497 note 12.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/2. RIGHTS OF COMMON AND RELATED RIGHTS/(1) DESCRIPTIONS OF RIGHTS/(v) Common of Piscary/464. Protection of right.

464. Protection of right.

The owner of a right of common of fishing in a defined part of a river, lake, or pond has a profit à prendre which gives him a right against any person who disturbs him either by trespass or nuisance, or in any other substantial manner¹.

¹ *Fitzgerald v Firbank* [1897] 2 Ch 96, CA, where the plaintiff claimed an exclusive right of fishing under a deed, and brought his action against a railway contractor for turning into the river quantities of water loaded with mud and so disturbing the fish; but the principle would apply equally to an ordinary trespass and to a commoner with right of fishing.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/2. RIGHTS OF COMMON AND RELATED RIGHTS/(1) DESCRIPTIONS OF RIGHTS/(vi) Common in the Soil/465. Nature of right.

(vi) Common in the Soil

465. Nature of right.

The right of digging for sand, stone, coals, minerals, etc, has been recognised as a right of common from early times¹. It is similar in nature to the commons of turbary² and estovers³, and may be appurtenant to land or held in gross. The right must be claimed by grant or prescription⁴, except where the claim is made in right of a tenement formerly copyhold⁵ of a manor, when the right may be claimed by custom⁶, but a custom claimed for inhabitants of a district, or for any other class incapable of taking under a grant, to have rights of common in the soil is bad, and cannot be supported⁷. Where the right has been admitted by the lord of a manor, of which admission the court rolls are evidence, it is not necessary to prove that the right is reasonable, as it is where the existence of, and a legal origin for, the right have to be presumed from evidence merely of acts done within living memory (that is, since 1189)⁸.

The right can only be claimed in places which produce the sand or stone or other particular profit claimed, and can have no existence on other parts of the land⁹.

The right of common in the soil now requires registration¹⁰ in order to be exercisable¹¹. The extraction of materials from the soil may also be regulated or prohibited if the common is a site of special scientific interest¹², or as restricted works for the purposes of the Commons Act 2006¹³. Planning permission may also be required¹⁴.

1 Co Litt 122a.

2 As to common of turbary see PARAS 457-458.

3 As to common of estovers see PARAS 459-460.

4 *Gateward's Case* (1607) 6 Co Rep 59b, Resolution 8; cf *Grimstead v Marlowe* (1792) 4 Term Rep 717; *Blewett v Tregonning* (1835) 3 Ad & El 554; *Race v Ward* (1855) 4 E & B 702.

5 Copyhold has been abolished, subject to a saving for commonable rights: see **REAL PROPERTY** vol 39(2) (Reissue) PARA 31 et seq.

6 *Rogers v Brenton* (1847) 10 QB 26 at 61 per Lord Denman CJ; *Heath v Deane* [1905] 2 Ch 86.

7 *Race v Ward* (1855) 4 E & B 702 (where a claim to take water from a spring and to pass over a field for that purpose was held to be an easement, and not a profit à prendre). See also *Gateward's Case* (1607) 6 Co Rep 59b, Resolution 8; *Grimstead v Marlowe* (1792) 4 Term Rep 717; *Blewett v Tregonning* (1835) 3 Ad & El 554; *Constable v Nicholson* (1863) 14 CBNS 230 (followed in *Hough v Clark and Hall* (1907) 23 TLR 682); and PARA 472 text and note 12.

8 *Heath v Deane* [1905] 2 Ch 86 (where the plaintiff, who claimed the right to take stone from a quarry on the waste, was both a freehold and a copyhold tenant, so that it was unnecessary to decide whether a freehold tenant could claim otherwise than by prescription). As to legal memory see PARA 433 text and note 5.

9 *Peardon v Underhill* (1850) 16 QB 120; *Dean and Chapter of Ely v Warren* (1741) 2 Atk 189; *Maxwell v Martin* (1830) 6 Bing 522.

10 See PARA 403.

11 See PARA 403 text and note 8.

12 As to management schemes for sites of special scientific interest see PARA 610; and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 686.

13 As to the prohibition on the carrying out of restricted works without consent see the Commons Act 2006 Pt 3 (ss 38-44) (not fully in force in relation to Wales); and PARA 612 et seq.

14 As to planning permission for the extraction of minerals see **TOWN AND COUNTRY PLANNING** vol 46(2) (Reissue) PARA 710 et seq.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/2. RIGHTS OF COMMON AND RELATED RIGHTS/(1) DESCRIPTIONS OF RIGHTS/(vi) Common in the Soil/466. Extent of right.

466. Extent of right.

A prescription to dig stones for the purpose of repairing the commoner's house and for use on freehold tenements held of the manor has been recognised¹, and the practice of digging sand and gravel was one of very general occurrence². The right to take brick earth³ and even coal to be used for fuel⁴ has also been established.

Prescriptions for these rights must fall within the usual rules. The right must be claimed by persons capable of taking by grant, must be reasonable and certain in its nature, and must (except perhaps when the quantity to be taken is certain) be exercised by the commoner himself⁵.

1 *Inclendon v Burges* (1689) Carth 65; *Heath v Deane* [1905] 2 Ch 86.

2 *R v Tewkesbury (Trustees for Burgesses)* (1810) 13 East 155; *Duberley v Page* (1788) 2 Term Rep 391; cf *Hough v Clark and Hall* (1907) 23 TLR 682. The right to take sand may still exist in places: see the *Report of the Royal Commission on Common Land 1955-1958* (Cmd 462) para 175. There have been various cases as to the right to take minerals from the seashore, but such a right is not a right of common: see *Blewett v Tregonning* (1835) 3 Ad & El 554; *Alfred F Beckett Ltd v Lyons* [1967] Ch 449, [1967] 1 All ER 833 at 839, CA; and **WATER AND WATERWAYS** vol 100 (2009) PARA 56 et seq.

3 *Church v Inclosure Comrs* (1862) 11 CBNS 664; *Marquis of Salisbury v Gladstone* (1861) 9 HL Cas 692 at 701.

4 Co Litt 122a; *Duke of Portland v Hill* (1866) LR 2 Eq 765.

5 See *Clayton v Corby* (1843) 5 QB 415 (where previous cases on this subject were considered); cf *Heath v Deane* [1905] 2 Ch 86.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/2. RIGHTS OF COMMON AND RELATED RIGHTS/(2) CREATION OF RIGHTS OF COMMON/(i) In general/467. Time and mode of creation.

(2) CREATION OF RIGHTS OF COMMON

(i) In general

467. Time and mode of creation.

Rights of common are presumed to lie in grant¹. Historically most arose from the economic structure of the medieval village and being of ancient origin before the time of legal memory² were treated as arising by prescription which itself in law presumes a (lost) grant³. Long use was sufficient to found a presumption of a lost modern grant⁴. The Prescription Act 1832 provided for a right of common after 30 years' exercise⁵. Common law rights of common (as distinct from customary commonable rights) also arose when a customary tenement was enfranchised. This could happen either by agreement when a right of common could be implied or expressly granted or by statutory enfranchisement under the Copyhold Acts 1840 to 1894 and the Law of Property Act 1922 when there was an automatic implication of conversion of commonable rights to rights of common⁶. If the owner both of a farm and of the waste sold off or granted away the farm then a right of common could again be either implied or expressly granted. This occurred where the former occupiers of the farm had traditionally had grazing on the common waste⁷. It has now been held that rights of common can be included in the rights impliedly transferred under the relevant provision⁸ of the Law of Property Act 1925⁹.

The Commons Act 2006 provides that a right of common¹⁰ cannot at any time after the commencement of the relevant provisions¹¹ be created over land¹² to which Part 1 of that Act applies¹³ by virtue of prescription¹⁴. Nor, at any time after the commencement of the relevant provisions¹⁵, can a right of common be created in any other way over land to which Part 1 applies except:

- 69 (1) by way of express grant if:
 - 5
 - 6. (a) the land is not registered as a town or village green¹⁶; and
 - 7. (b) the right is attached to land¹⁷; or
 - 6
- 70 (2) pursuant to any other enactment¹⁸.

The creation of a right of common in accordance with heads (1) and (2) above only has effect if it complies with such requirements as to form and content as regulations¹⁹ may provide²⁰; and it does not operate at law until on an application²¹:

- 71 (i) the right is registered in a register of common land²²; and
- 72 (ii) if the right is created over land not registered as common land²³, the land is registered in a register of common land²⁴.

Such an application to register the creation of a right of common consisting of a right to graze any animal²⁵ is to be refused if in the opinion of the commons registration authority²⁶ the land over which it is created would be unable to sustain the exercise of that right and, if the land is already registered as common land, any other rights of common registered as exercisable over the land²⁷.

At the date at which this volume states the law, the provisions of the Commons Act 2006 set out above²⁸ were fully in force only in relation to the pilot areas in England, namely the registration areas²⁹ of the following registration authorities:

- 73 (A) Blackburn with Darwen Borough Council;
- 74 (B) Cornwall County Council;
- 75 (C) Devon County Council;
- 76 (D) County of Herefordshire District Council;
- 77 (E) Hertfordshire County Council;
- 78 (F) Kent County Council; and
- 79 (G) Lancashire County Council³⁰.

1 *Hall v Moore*[2009] EWCA Civ 201, [2009] All ER (D) 235 (Mar).

2 *le before 1189*: see PARA 433 text and note 5.

3 See PARA 470.

4 See PARA 472. In *Tehidy Minerals Ltd v Norman* [1971] 2 QB 528, [1971] 2 All ER 475, the Court of Appeal found a lost modern grant.

5 See PARA 473.

6 See **REAL PROPERTY** vol 39(2) (Reissue) PARA 31 et seq.

7 In *Owen v Blathwayt*[2002] EWHC 2231 (Ch), [2003] 1 P & CR 444, [2002] All ER (D) 01 (Nov), there was an express grant of 'the right in common with all other persons entitled to a like right to turn out upon Porlock Common ... such horses, cattle and other stock as can properly be maintained on the property hereby conveyed'. It was not argued that this created any right of common as such but the parties evidently regarded it as similar in nature. In *Hall v Moore*[2009] EWCA Civ 201, [2009] All ER (D) 235 (Mar) the Court of Appeal found that on the grant of an agricultural tenancy a right of common was implied under the Law of Property Act 1925 s 62 (as to which see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 236).

8 *le the Law of Property Act 1925 s 62(1)*: see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 236.

9 Although the Law of Property Act 1925 s 62(1) (general words implied in conveyances of land) refers to 'easements' it does not specifically mention 'profits' or 'commons' unlike 62(3) (general words implied in conveyance of a manor) but it does include 'rights'. Section 62(1) was argued in *Bettison v Langton*[2001] UKHL 24, [2002] 1 AC 27, [2001] 3 All ER 417 and briefly referred to in the judgment of Lord Scott of Foscote but it was not necessary to decide the point. However in *Hall v Moore*[2009] EWCA Civ 201, [2009] All ER (D) 235 (Mar) the Court of Appeal held that a right of common was implied under the Law of Property Act 1925 s 62(1) into an agricultural tenancy of the dominant farm. Presumably on severance of ownership of a freehold farm from a common on sale by an owner of both such a quasi right would be enlarged into a full right.

Except in the pilot areas in England (see the text and notes 29-30), a right of common created after 2 January 1970 may be registered under the Commons Registration Act 1965 (see PARA 508 et seq), but if either the right or the land over which it is claimed was registrable before 3 January 1970 an application to register it cannot be considered: see the Commons Registration (New Land) Regulations 1969, SI 1969/1843, Schedule Form 31 note 9; the Commons Act 2006 (Commencement No 2, Transitional Provisions and Savings) (England) Order 2007, SI 2007/456, art 4(3); the Commons Act 2006 (Commencement No 1, Transitional Provisions and Savings) (Wales) Order 2007, SI 2007/2386, art 4(2)(b).

10 As to the meaning of 'right of common' see PARA 405.

11 *le the commencement of the Commons Act 2006 s 6(1)-(6)*. See further the text and notes 28-30.

12 As to the meaning of 'land' see PARA 403 note 1.

13 As to land to which the Commons Act 2006 Pt 1 (ss 1-25) applies see s 5(1); and PARA 424 note 6.

14 Commons Act 2006 s 6(1) (not fully in force).

15 See note 11.

- 16 See the Commons Act 2006 s 6(3)(a). As to the meaning of 'land registered as a town or village green' see PARA 424 note 12.
- 17 See the Commons Act 2006 s 6(3)(b).
- 18 Commons Act 2006 s 6(2), (3) (not fully in force).
- 19 As to the meaning of 'regulations' see PARA 602 note 7; and as to the making of regulations see generally the Commons Act 2006 s 59.
- 20 Commons Act 2006 s 6(4) (not fully in force).
- 21 Is an application under the Commons Act 2006 s 6 (not fully in force): see PARA 468.
- 22 As to the meaning of 'register of common land' see PARA 424 note 7.
- 23 As to the meaning of 'land registered as common land' see PARA 424 note 7.
- 24 Commons Act 2006 s 6(5) (not fully in force).
- 25 As to the meaning of 'right to graze' see PARA 435 note 2.
- 26 As to the commons registration authorities see PARA 507.
- 27 Commons Act 2006 s 6(6) (not fully in force). Subject to that, and to any other provision made by or under Pt 1 (ss 1-25) (not fully in force), an application made for the purposes of s 6 must be granted: see s 24(4). In relation to the pilot areas in England (see the text and notes 29-30), the determining authority must consult Natural England before determining an application to register the creation, under s 6, of a right of common consisting of a right to graze any animal: Commons Registration (England) Regulations 2008, SI 2008/1961, reg 36. As to the meaning of 'determining authority' see PARA 522 note 19.
- 28 Is the Commons Act 2006 s 6.
- 29 For these purposes, 'registration area', in relation to a registration authority, means (1) all the land within the area of that authority, except for any land for which another authority acts as the registration authority pursuant to an agreement made under the Commons Act 2006 s 4(3) or the Commons Registration Act 1965 s 2(2) (see PARA 507); and (2) any other land for which that authority acts as the registration authority pursuant to such an agreement: Commons Act 2006 (Commencement No 4 and Savings) (England) Order 2008, SI 2008/1960, art 1(2). The Commons Registration (England) Regulations 2008, SI 2008/1961, which only apply in relation to the pilot areas (see note 30), contain an identical definition: see reg 2(1).
- 30 See the Commons Act 2006 (Commencement No 4 and Savings) (England) Order 2008, SI 2008/1960, arts 1(2), (2)(b), Schedule. The Commons Registration (England) Regulations 2008, SI 2008/1961, Schedule contains an identical list; those regulations only apply in relation to the pilot areas: see reg 1(c). Additionally, the Welsh Ministers had power to make regulations under the Commons Act 2006 s 6(4): see the Commons Act 2006 (Commencement No 1, Transitional Provisions and Savings) (Wales) Order 2007, SI 2007/2386, art 2(2). At the date at which this volume states the law, the Commons Act 2006 s 6 was not otherwise in force. As to the Welsh Ministers see PARA 423.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/2. RIGHTS OF COMMON AND RELATED RIGHTS/(2) CREATION OF RIGHTS OF COMMON/(i) In general/468. Method of application in the pilot areas for the registration of a new right of common.

468. Method of application in the pilot areas for the registration of a new right of common.

In relation to the pilot areas in England¹ an application for the registration of a new right of common² may only be made by:

- 80 (1) the owner of the land over which the right of common is to be exercisable; or
- 81 (2) the owner of the land to which the right of common is to be attached;

and the application must show in which capacity it is made³.

The application must show that the following persons consent to it:

- 82 (a) the owner (other than an owner who is the applicant) of the land over which the right of common is to be exercisable or of the land to which the right of common is to be attached;
- 83 (b) any relevant leaseholder⁴ of the land over which the right of common is to be exercisable;
- 84 (c) any person having the benefit of a relevant charge⁵ over the land over which the right of common is to be exercisable⁶.

The application must include:

- 85 (i) evidence of the applicant's capacity to make the application by virtue of head (1) or head (2) above;
- 86 (ii) a description of the right of common to be created;
- 87 (iii) a description of the land⁷ over which the right of common is to be exercisable;
- 88 (iv) a description of the land to which the right of common is to be attached; and
- 89 (v) where the right of common to be created consists of a right to graze any animal, evidence that the land over which that right would be exercisable is able to sustain the exercise of that right (together with, if the land is already registered as common land, any other rights of common registered as exercisable over that land)⁸.

1 As to the pilot areas in England see PARA 467 text and notes 29-30.

2 ie under the Commons Act 2006 s 6: see PARA 467.

3 Commons Registration (England) Regulations 2008, SI 2008/1961, Sch 4 para 1(1). In addition to the persons and bodies listed in the Commons Registration (England) Regulations 2008, SI 2008/1961, Sch 6 para 1 (see PARA 550 note 24), the application must be served on the following persons (other than the applicant), ie the owner of the land over which the right of common is or will be exercisable, or the owner of the land to which the right of common is or will be attached, or the owner of the right of common in gross, as the case may be: Sch 6 para 2, Table. 'Right of common in gross' means a right of common which is not registered as being attached to land: reg 2(1). As to rights of common of pasture in gross see PARAS 446-447. As to applications in relation to the pilot areas see generally Pt 3 (regs 15-38); and PARAS 540, 549 et seq; as to the fee to accompany the application see PARA 549 note 11; as to the service of documents see PARA 532 note 17; and as to the meaning of 'register of title' see PARA 430 note 4.

4 'Relevant leaseholder' means a leaseholder under a lease for a term of more than seven years from the date on which the lease was granted: Commons Act 2006 s 15(10) (definition applied for these purposes by the Commons Registration (England) Regulations 2008, SI 2008/1961, reg 2(1)).

5 'Relevant charge' means (1) in relation to land which is registered in the register of title, a registered charge within the meaning of the Land Registration Act 2002; (2) in relation to land which is not so registered, a charge registered under the Land Charges Act 1972 or a legal mortgage, within the meaning of the Law of Property Act 1925, which is not registered under the Land Charges Act 1972: Commons Act 2006 s 15(10) (definition applied for these purposes by the Commons Registration (England) Regulations 2008, SI 2008/1961, reg 2(1)).

6 Commons Registration (England) Regulations 2008, SI 2008/1961, Sch 4 para 1(2).

7 In relation to the pilot areas, the following provisions apply in relation to any requirement to describe land for the purposes of an application or proposal, except where another provision of the Commons Registration (England) Regulations 2008, SI 2008/1961, specifies the manner in which land is to be described in a particular case: reg 19(1). The land must be described, except where reg 19(3) applies, by an ordnance map accompanying the application or proposal and referred to in it: reg 19(2). Where the land is registered land, and the application relates to the whole of the land in a register unit, the land must be described by a reference to the number of that register unit: reg 19(3). Where part of the land is registered land, that part of the land must be described by a reference to the number of any register unit which includes that part: reg 19(4). Any ordnance map accompanying an application or proposal must show the land to be described by means of distinctive colouring within an accurately identified boundary and must be (1) on a scale of not less than 1:10,560 (six inches to one mile), where the land to be described consists wholly or predominantly of moorland, or is a neighbourhood or locality, which is being described for the purposes of an application under the Commons Act 2006 s 15 (registration of greens: see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 541) or is the land to which a right of common is attached; and (2) on a scale of not less than 1:2,500 in all other cases: Commons Registration (England) Regulations 2008, SI 2008/1961, reg 19(5). References to the land to which an application or proposal relates are to be interpreted, in relation to an application or proposal to register or amend the registration of a right of common, as meaning the land over which that right is or is to be exercisable: reg 2(2). As to the meanings of 'application' and 'proposal' see PARA 507 notes 10-11; as to the meaning of 'registered land' see PARA 477 note 9; and as to the meaning of 'moorland' see PARA 528 note 4. As to the register unit see PARA 527.

8 Commons Registration (England) Regulations 2008, SI 2008/1961, Sch 4 para 1(3).

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/2. RIGHTS OF COMMON AND RELATED RIGHTS/(2) CREATION OF RIGHTS OF COMMON/(ii) Creation by Express Grant/469. Creation by express grant.

(ii) Creation by Express Grant

469. Creation by express grant.

A right of common, being an incorporeal hereditament, must be granted by deed¹. The deed must contain apt words for the purpose²; mere general words will, as a rule, be insufficient³. There may, however, be a demise of a right of common by implication in a tenancy agreement⁴.

The effect of the Commons Registration Act 1965 has been to make express grants of rights of common in fee simple unexercisable if the land is already registered under the Act but a grant of a right of common over land not already registered will lead to the servient land becoming registrable⁵. The 1965 Act does not, however, apply to a grant of right for a term of years.

Under the Commons Act 2006, a right of common can only be created by way of express grant if the land is not registered as a town or village green⁶ and the right is attached to land⁷. Unlike the 1965 Act, the 2006 Act applies to a term of years. Unless the grant is on a demise of the whole of the dominant tenement with the rights of common attached, the term must not exceed two years in England or three years in Wales⁸.

1 See the Law of Property Act 1925 ss 51, 52, the provisions of which apply to incorporeal hereditaments: see ss 201(1), 205(1)(ix); and **REAL PROPERTY**. This was also the case at common law: see *Wood v Leadbitter* (1845) 13 M & W 838 at 842-843 per Alderson B. See further PARA 474 note 6.

2 *Bradshaw v Eyre* (1597) Cro Eliz 570; *Cowlam v Slack* (1812) 15 East 108 at 114 per Lord Ellenborough CJ; *Sacheverell v Porter* (1637) W Jo 396; cf *Warburton v Parke* (1857) 2 H & N 64 at 70 per Bramwell B.

3 Thus the use of the words 'with all commons, etc, thereto belonging or appertaining', where there is at the time of the grant no right of common existing, is insufficient (*Clements v Lambert* (1808) 1 Taunt 205; *Grymes v Peacock* (1610) 1 Bulst 17; *Bradshaw v Eyre* (1597) Cro Eliz 570); but a grant coupled with such words as 'with all commons, etc, thereto appertaining or occupied or used therewith' (*Worledg v Kingswel* (1600) Cro Eliz 794), or 'with all common thereunto belonging and appertaining' (*Styant v Staker* (1691) 2 Vern 250), or 'with such common as the last tenant had enjoyed' (*Hall v Byron* (1877) 4 ChD 667; *Baring v Abingdon* [1892] 2 Ch 374, CA), will create a new right of the same nature as that previously enjoyed, for, although it was not common in the hands of the grantor, it is quasi common used with the land (*Bradshaw v Eyre*; cf *Ballard v Dyson* (1808) 1 Taunt 279 at 384 per Lord Mansfield CJ). See also *White v Taylor (No 2)* [1969] 1 Ch 160, [1968] 1 All ER 1015; and PARA 439. But see *Anderson v Bostock* [1976] Ch 312, [1976] 1 All ER 560 (a sole and exclusive right of grazing did not pass under the Law of Property Act 1925 s 62 on the conveyance of land claimed to be a dominant tenement; a sole and exclusive right cannot be appurtenant to land; appurtenant rights must be related to the needs or use of the dominant tenement). As to the Law of Property Act 1925 s 62 see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 236; **EASEMENTS AND PROFITS A PRENDRE**. Cf the text and note 4.

The construction of a grant may show that a right of common is not thereby created; for example, where the Crown under statutory powers had dedicated land as a permanent common, but named no commoners, it was held that common of pasture was not created: *Sydney Municipal Council, New South Wales Agricultural Society and Sydney Driving Park Club Ltd v A-G of New South Wales and Milroy* [1894] AC 444, PC. Since 1881 general words are implied in all conveyances: see now the Law of Property Act 1925 s 62. See also *Re Broxhead Common, Whitehill, Hampshire* (1977) 33 P & CR 451; and PARA 439 note 4.

4 *Hall v Moore* [2009] EWCA Civ 201, [2009] All ER (D) 235 (Mar).

5 See the Commons Registration Act 1965 s 13(b) (repealed by the Commons Act 2006 Sch 6 Pt 1, subject to transitional provisions); the Commons Registration (New Land) Regulations 1969, SI 1969/1843, reg 3(2); the Commons Act 2006 (Commencement No 2, Transitional Provisions and Savings) (England) Order 2007, SI 2007/456, art 4(3); the Commons Act 2006 (Commencement No 1, Transitional Provisions and Savings) (Wales) Order 2007, SI 2007/2386, art 4(2)(b). See also the Commons Act 2006 s 6(5) (not fully in force); and PARA 467.

6 As to the meaning of 'land registered as a town or village green' see PARA 424 note 12.

7 See the Commons Act 2006 s 6(3) (not fully in force); and PARA 467.

8 See the Commons (Severance of Rights) (England) Order 2006, SI 2006/2145, art 2, the Commons (Severance of Rights) (Wales) Order 2007, SI 2007/583, art 2; and PARA 500.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/2. RIGHTS OF COMMON AND RELATED RIGHTS/(2) CREATION OF RIGHTS OF COMMON/(iii) Creation by Prescription where the Commons Act 2006 does not Apply/470. Methods of prescription.

(iii) Creation by Prescription where the Commons Act 2006 does not Apply

470. Methods of prescription.

There were three methods of claiming a right of common by prescription:

- 90 (1) at common law¹;
- 91 (2) under the doctrine of a lost modern grant²; or
- 92 (3) under the Prescription Act 1832³.

Each method is, in theory, based on the presumption that at some time past the right was granted by deed, since incorporeal hereditaments lie in grant⁴. It seems, however, that it is impossible for a claim to be made since 1970⁵ for a prescriptive right at common law, because the user must be presumed to have existed since time immemorial, and had this been the position the right of common should have been registered⁶.

A prescription must be certain and reasonable⁷ and must have some connection with the land in respect of which it is claimed⁸. Claims in respect of rights of common in gross are very rare⁹.

It is no longer possible to create a right of common by prescription in the pilot areas in England¹⁰; and once Part 1 of the Commons Act 2006¹¹ is fully in force, this prohibition will apply to the whole of England and Wales¹².

1 A right claimed by prescription at common law must have been enjoyed from the time of legal memory, which is said to date from 1189 (ie the commencement of the reign of Richard I: see further PARA 433 text and note 5), but in point of fact the continuance of a usage for many years in modern times is taken as prima facie proof of its continued existence from time immemorial: *Bailey v Appleyard* (1838) 8 Ad & El 161 at 166 per Littledale J ('If the claim had been made by virtue of immemorial user, or of a non-existing grant, as was done before the [Prescription Act 1832] 28 years' enjoyment would have been some evidence'). The actual number of years in claims by prescription at common law, as distinguished from claims under the Prescription Act 1832, is not fixed. Evidence carrying back the enjoyment of the right so far as living witnesses can testify, which may be taken as from 40 to 50 years, is, unless rebutted by other circumstances, presumptive evidence that the right has existed from time immemorial and a sufficient foundation for establishing a prescriptive right. A regular usage even for 20 years unexplained and uncontradicted has been held sufficient to enable the court to find that a custom has existed from time immemorial: *R v Joliffe* (1823) 2 B & C 54; and see also *Bealey v Shaw* (1805) 6 East 208 at 215 per Lord Ellenborough CJ, as to a similar presumption from 20 years' user of water; *Gann v Whitstable Free Fishers* (1865) 11 HL Cas 192 at 210 per Lord Wensleydale. As such evidence is only presumptive, and an element to be taken into consideration by the court, it may be rebutted by evidence showing either that the usage has actually commenced or that it must necessarily have commenced within the time of legal memory: See *Addington v Clode* (1775) 2 Wm Bl 989; cf *R v Ashby Folville (Inhabitants)* (1866) LR 1 QB 213; *Bryant v Foot* (1868) LR 3 QB 497, Ex Ch; *Mill v New Forest Comr* (1856) 18 CB 60 (a case under the Prescription Act 1832). Nevertheless user, however long, will not establish a right which is unlawful in itself, whether the claim is by custom, prescription or lost grant: see PARA 472. As to prescription at common law see now, however, the text and notes 5-6.

2 See PARA 472.

3 See PARA 473.

4 See PARA 469. As to the acquisition of rights by prescription see further **EASEMENTS AND PROFITS A PRENDRE** vol 16(2) (Reissue) PARAS 74 et seq, 274 et seq. An application to register a right based on prescription cannot be entertained if either the right was registrable or the land over which it is claimed was registered under the

Commons Registration Act 1965 before 3 January 1970: see the Commons Registration (New Land) Regulations 1969, SI 1969/1843, reg 3. See also PARA 403.

5 The period for lodging applications for registration of common rights expired on 2 January 1970, and the time limit for registrations expired on 31 July 1970: Commons Registration (Time Limits) Order 1966, SI 1966/1470, arts 2, 3 (amended by SI 1970/383).

6 As to the requirement of registration see PARA 403. Failure to register rights of common makes them unexercisable: see PARA 403 text and note 8.

7 Co Litt 122a; *Clayton v Corby* (1843) 5 QB 415; *Hayward v Cunnington* (1668) 1 Lev 231; *Lord Chesterfield v Harris* [1908] 2 Ch 397, CA (affd sub nom *Harris v Earl of Chesterfield* [1911] AC 623, HL), which practically overrules *Chesterfield v Fountaine* (1895) reported at [1908] 1 Ch 243n, DC, where the same rights were in question and Wills J and Wright J held that, though a custom must be reasonable, a prescription need not. The question, however, in *Chesterfield v Fountaine* [1908] 1 Ch 243n, DC was whether the right could have a legal existence, and the facts were not fully expounded. See further *Payne v Ecclesiastical Comrs and Landon* (1913) 30 TLR 167.

8 2 Bl Com 265; *Cowlam v Slack* (1812) 15 East 108; *Baring v Abingdon* [1892] 2 Ch 374, CA. See, for instance, *Chilton v London Corpn* (1878) 7 ChD 562 (pannage); *Earl De la Warr v Miles* (1881) 17 ChD 535, CA (right to take bracken); *Clayton v Corby* (1843) 5 QB 415 (right to take sand, stone and gravel); cf *Lord Chesterfield v Harris* [1908] 2 Ch 397 at 410, CA, per Cozens-Hardy MR (affd sub nom *Harris v Earl of Chesterfield* [1911] AC 623, HL).

9 Examples include: *Welcome v Upton* (1840) 6 M & W 536; *Shuttleworth v Le Fleming* (1865) 19 CBNS 687; *Johnson v Barnes* (1873) LR 8 CP 527.

10 As to the pilot areas in England see PARA 467 text and notes 29-30.

11 Ie the Commons Act 2006 Pt 1 (ss 1-25) (not fully in force).

12 See the Commons Act 2006 s 6(1) (not fully in force); and PARA 467.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/2. RIGHTS OF COMMON AND RELATED RIGHTS/(2) CREATION OF RIGHTS OF COMMON/(iii) Creation by Prescription where the Commons Act 2006 does not Apply/471. Mode of user requisite.

471. Mode of user requisite.

The user necessary to establish a prescription, whether at common law, by lost grant or by statute, must be continuous, and neither by violence, nor by stealth, nor by leave asked from time to time¹, requirements which have been frequently made use of to express the requirement 'as of right' in cases of claims under the Prescription Act 1832². If one of these requirements is unsatisfied, the prescription will fail. Modern intermissions, however, in the exercise of the enjoyment shown to have existed for a long time, will not invalidate the proof, if the court is satisfied that the right was exercised as often as the claimant had occasion for it³.

In the case of a right such as pasturage which, of its nature, would only be used intermittently, it is not necessary for the claimant to establish that he and his predecessors have used it continuously, but the user must be shown to have been of such a character, degree and frequency as to indicate an assertion of a continuous right⁴.

Rights of common now require registration in order to be exercisable⁵. It is no longer possible to create a right of common by prescription in the pilot areas in England⁶; and once Part 1 of the Commons Act 2006⁷ is fully in force, this prohibition will apply to the whole of England and Wales⁸.

1 *Mills v Colchester Corp* (1867) LR 2 CP 476 at 486 per Willes J, translating '*longus usus, nec per vim, nec clam, nec precario*', etc (Co Litt 114a). See also *Meacher v Blair-Oliphant* 1913 SC 417, Ct of Sess (evidential value of statistical accounts and ordnance survey maps, and of user of a lake for purposes of establishing title by prescription). As to the interruptions which can be ignored when registering under the Commons Registration Act 1965 rights based on a prescriptive claim see s 16 (land requisitioned or grazing not possible because of animal health); and PARA 473.

2 See PARA 473.

3 *Musgrave v Inclosure Comrs* (1874) LR 9 QB 162 (where a right was established in respect of a particular farm, though for several periods the tenant had turned out no sheep upon the land, when he had no fell flock). As to proof of continuous user under the Prescription Act 1832 see also *Earl De la Warr v Miles* (1881) 17 ChD 535 at 600, CA, per James LJ; *Carr v Foster* (1842) 3 QB 581.

4 *White v Taylor (No 2)* [1969] 1 Ch 160, [1968] 1 All ER 1015.

5 See PARA 403.

6 As to the pilot areas in England see PARA 467 text and notes 29-30.

7 Ie the Commons Act 2006 Pt 1 (ss 1-25) (not fully in force).

8 See the Commons Act 2006 s 6(1) (not fully in force); and PARA 467.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/2. RIGHTS OF COMMON AND RELATED RIGHTS/(2) CREATION OF RIGHTS OF COMMON/(iii) Creation by Prescription where the Commons Act 2006 does not Apply/472. Doctrine of lost modern grant.

472. Doctrine of lost modern grant.

The doctrine of lost modern grant is a judge-made fiction to avoid the problem where user was shown to have started after 1189¹. It presumes from the long user that an easement or profit has been granted after 1189 but that the grant has been lost. The doctrine has been relied on where it has been impossible to base a claim on prescription at common law or under the Prescription Act 1832². A grant will not be presumed when some other origin can be offered as an explanation of the user³, or when the enjoyment can otherwise be reasonably accounted for⁴, but mistaken belief does not amount to an alternative explanation⁵, and the presumption is not rebutted either by circumstantial evidence tending to negative the existence of a grant⁶ or, in some circumstances, by discontinuity of user⁷.

A lost grant will not be presumed where such a grant would have been in contravention of a statute⁸, unless it is merely a private Act the provisions of which may be subsequently waived⁹. In the case of rights which can have no lawful beginning nor be created by any kind of grant or reservation or deed that can be supposed, a prescription is not good¹⁰. No user, however long, will establish a right which is unlawful in itself, whether the claim is by custom, prescription, or lost grant¹¹.

Prescription presupposing a grant to have previously existed must not only be for things which can be created by grant, but must be claimed by persons who are capable of taking by grant. Thus inhabitants and other fluctuating bodies cannot prescribe¹², although they may be capable of taking the benefits of a grant vested in some person or corporate body such as the mayor and corporation of a town¹³; occupiers or tenants cannot prescribe in their own names but must do so in the name of their landlords¹⁴.

A grant cannot be presumed either where the owner of the land is incapable of making a grant¹⁵, or is incapable of resisting the user upon which the presumption of a lost grant is to be founded¹⁶, or where he is ignorant of the user of his land¹⁷; but such cases can hardly occur in the user of rights of common, and are mentioned merely with the view of illustrating one of the fundamental principles which lie at the root of prescription and of the fiction of a lost grant, namely acquiescence on the part of the owner of the servient tenement, the acquisition of a right being precluded where the user has been by violence, by stealth, or by leave asked from time to time¹⁸.

A person claiming a lost grant will not have to give particulars as to the parties but he must be able to plead whether the grant is alleged to have been made before or after a particular date¹⁹. Where there has been upwards of 20 years' uninterrupted enjoyment of the right, such enjoyment having the necessary qualities to fulfil the requirements of prescription, then, unless the existence of such a grant is impossible²⁰, the law will adopt a legal fiction that such a grant was made, in spite of any direct evidence that no such grant was in fact made²¹.

Rights of common now require registration in order to be exercisable²². It is no longer possible to create a right of common by prescription in the pilot areas in England²³; and once Part 1 of the Commons Act 2006²⁴ is fully in force, this prohibition will apply to the whole of England and Wales²⁵.

1 le beyond the time of legal memory: see PARA 433 text and note 5. As to the growth of the doctrine see *Angus & Co v Dalton* (1877) 3 QBD 85 at 105 per Cockburn CJ; and for the leading case establishing rights of common see *Cowlam v Slack* (1812) 15 East 108. *Angus & Co v Dalton* (1877) 3 QBD 85 was considered at

length in *Tehidy Minerals Ltd v Norman* [1971] 2 QB 528, [1971] 2 All ER 475, CA, where it was held that proof of a period of more than 20 years' enjoyment of a right of grazing gave rise to a presumption of a lost modern grant and that presumption could only be rebutted by evidence that the grant was impossible.

2 For a form of statement of claim asserting lost modern grant see eg *Hulbert v Dale* [1909] 2 Ch 570 at 576, CA, per Joyce J.

3 See *A-G v Simpson* [1901] 2 Ch 671 at 698 per Farwell J; *A-G v Antrobus* [1905] 2 Ch 188; cf *A-G v Horner* (1884) 14 QBD 245, CA.

4 *Lyell v Lord Hothfield* [1914] 3 KB 911.

5 *Bridle v Ruby* [1989] QB 169, [1988] 3 All ER 64, CA.

6 *Tehidy Minerals Ltd v Norman* [1971] 2 QB 528, [1971] 2 All ER 475.

7 *Hayling v Harper* [2003] EWCA Civ 1147, [2004] 1 P & CR 563, [2003] 3 EGLR 5.

8 *Neaverson v Peterborough RDC* [1902] 1 Ch 557, CA (where a lost grant was attempted to be set up in justification of a practice, which had existed for more than 50 years, of letting the pasturage of roads in a fen district for horses and cattle contrary to the provisions of an award made in conformity with an Inclosure Act under which sheep only were to be depastured on the roads); *Mill v New Forest Comr* (1856) 18 CB 60 (where a right of common had been exercised for more than 30 years over the waste lands of the New Forest, and it was shown that the Crown was incapacitated by statute from making any such grant). As to where a continuous user has subsequently become illegal see *Hayling v Harper* [2003] EWCA Civ 1147, [2004] 1 P & CR 563, [2003] 3 EGLR 5 (a case concerning an easement).

9 See *Great Eastern Rly Co v Goldsmid* (1884) 9 App Cas 927, HL.

10 3 Cru Dig tit xxxi chap 1, s 1, 11; and see *Addington v Clode* (1775) 2 Wm Bl 989 (where the production of ancient but undated grants in support of a prescriptive claim to a right of common was held not necessarily inconsistent with the prescriptive claim, as the grants might have been either before the time of legal memory, or have confirmed a previously existing right).

11 See *A-G v Mathias* (1858) 4 K & J 579 at 590 per Byles J (where the reasons against a claim under each of these three grounds are fully stated with earlier authorities); cf *Harris v Earl of Chesterfield* [1911] AC 623, HL.

12 *Gateward's Case* (1607) 6 Co Rep 59 b; *Lord Rivers v Adams* (1878) 3 ExD 361. They can prescribe if incorporation by a Crown grant can be presumed: *Lord Rivers v Adams* (1878) 3 ExD 361. In *Harris v Earl of Chesterfield* [1911] AC 623, the House of Lords by a majority refused to presume incorporation. A grant by the Crown may raise a presumption of incorporation: see the dicta in *Chilton v London Corp'n* (1878) 7 ChD 735; and see also *Mitcham Common Conservators v Banks* (1912) 76 JP 413; and PARAS 413 note 2, 455 note 5.

13 *Mellor v Spateman* (1669) 1 Saund 339, 343; *Johnson v Barnes* (1873) LR 8 CP 527 (where the sole pasturage during certain times of the year was held to be vested in the corporation, though the rights had always been treated as rights of common); *Re Norwich Town Close Estate Charity* (1888) 40 ChD 298, CA. It must appear that the grant to the corporation or other trustees was made for the benefit of the class entitled. A plea of a grant of a right of common to a corporation is not sufficient as regards a member of that corporation and he must show that the grant was to the corporation for the benefit of individual members: see *Parry v Thomas* (1850) 5 Exch 37; *Constable v Nicholson* (1863) 14 CBNS 230.

14 *Grimstead v Marlowe* (1792) 4 Term Rep 717; *Tilbury v Silva* (1890) 45 ChD 98, CA; *Austin v Amhurst* (1877) 7 ChD 689.

15 See *Rochdale Canal Co v Radcliffe* (1852) 18 QB 287 at 315; *Staffordshire and Worcestershire Canal Navigation Proprietors v Birmingham Canal Navigation Proprietors* (1866) LR 1 HL 254 at 287.

16 In the same way that a user under such circumstances cannot be taken into account in calculating the periods necessary to establish a claim under the Prescription Act 1832: see *Winship v Hudspeth* (1854) 10 Exch 5 (where a right of way over a yard had been enjoyed for 20 years, during the first seven of which the house to which it belonged had been let to tenants); cf *Sturges v Bridgman* (1879) 11 ChD 852, CA.

17 See *Union Lighterage Co v London Graving Dock Co* [1901] 2 Ch 300 (affd [1902] 2 Ch 557, CA); *Davies v Du Paver* [1953] 1 QB 184, [1952] 2 All ER 991, CA. See also PARA 473.

18 *Sturges v Bridgman* (1879) 11 ChD 852 at 863, CA, per Thesiger LJ, quoted in *Union Lighterage Co v London Graving Dock Co* [1901] 2 Ch 300 at 306 per Cozens-Hardy J; *Dalton v Angus & Co* (1881) 6 App Cas 740 at 772, HL, per Fry J. As to contentious user being insufficient see *Eaton v Swansea Waterworks Co* (1851) 17

QB 267; and PARA 473. Acquiescence, or toleration, as distinct from permission, does not prevent the user from being as of right: *Mills v Silver* [1991] Ch 271, [1991] 1 All ER 449, CA; *R v Oxfordshire County Council, ex p Sunningwell Parish Council* [2000] 1 AC 335, [1999] 3 All ER 385, HL; *R (on the application of Beresford) v Sunderland City Council* [2003] UKHL 60, [2004] 1 AC 889, [2004] 1 All ER 160 (a case concerning a green).

19 *Palmer v Guadagni* [1906] 2 Ch 494; *Tremayne v English Clays Lovering Pochin & Co Ltd* [1972] 2 All ER 234, [1972] 1 WLR 657; cf *Gabriel Wade & English Ltd v Dixon & Cardus Ltd* [1937] 3 All ER 900. The other side might be able to show, if the lost grant was subsequent to an Inclosure Act, that there was no one who was capable of making the grant: see eg *Neaverson v Peterborough RDC* [1902] 1 Ch 557, CA. As to the Inclosure Acts and inclosure see generally PARA 418 et seq.

20 Eg because of the incapacity to make the grant on the part of the person who might at some time before the commencement of the 20 year period have made it.

21 See *Tehidy Minerals Ltd v Norman* [1971] 2 QB 528, [1971] 2 All ER 475, CA, interpreting *Dalton v Angus & Co* (1881) 6 App Cas 740, HL.

22 See PARA 403.

23 As to the pilot areas in England see PARA 467 text and notes 29-30.

24 Ie the Commons Act 2006 Pt 1 (ss 1-25) (not fully in force).

25 See the Commons Act 2006 s 6(1) (not fully in force); and PARA 467.

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473. The Prescription Act 1832.

The general features of a claim by prescription at common law, by the doctrine of a lost grant, and by virtue of the Prescription Act 1832, are much the same¹.

So far as relates to rights of common and other profits à prendre, the Act provides that no claim which may be lawfully made at common law by custom, prescription, or grant, to any right of common² or other profit or benefit to be taken and enjoyed from or upon any land³, where the right, profit, or benefit has been actually taken and enjoyed by any person claiming right to it⁴ without interruption⁵ for the full period of 30 years⁶, is to be defeated or destroyed by showing only that the right, profit or benefit was first taken or enjoyed at any time prior to such period of 30 years, but the claim may be defeated in any other way by which, at the passing of the statute⁷, it was liable to be defeated; and when the right, profit, or benefit has been taken and enjoyed for the full period of 60 years, the right to it is to be deemed absolute and indefeasible, unless it appears that it was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing⁸.

Each of these two periods of 30 years and 60 years is deemed to be the period next before some suit or action in which the claim or matter to which such period may relate has been or is brought into question⁹, and no act or other matter is deemed to be an interruption within the meaning of the statute unless the same has been submitted to or acquiesced in¹⁰ for one year after the party interrupted has had or has notice of it, and of the person making or authorising the same to be made¹¹. Therefore acquiescence for a period of 29 or 59 years gives an inchoate right, which cannot be enforced until the 30 or 60 years have expired¹².

Consequently, in claims under the Prescription Act 1832 to rights of common, a continuous enjoyment as of right and without interruption for either 30 or 60 years must be shown to have been exercised by the occupiers of the tenement in respect of which the right is claimed, and where enjoyment for the latter period can be shown the right is absolute and indefeasible, unless enjoyed by some consent or agreement evidenced by deed or writing. Parol consent or agreement is insufficient to bar the right¹³.

Rights of common now require registration in order to be exercisable¹⁴. It is no longer possible to create a right of common by prescription in the pilot areas in England¹⁵; and once Part 1 of the Commons Act 2006¹⁶ is fully in force, this prohibition will apply to the whole of England and Wales¹⁷.

1 Thus PARAS 470-472 will for the most part apply to claims under the Prescription Act 1832.

2 As to the meaning of 'right of common' see generally PARA 405. Rights of common in gross do not come within the Prescription Act 1832 as, although the words 'rights of common or other profit or benefit to be taken and enjoyed from or upon any land' in s 1 would be wide enough to include them, the rule as to pleading laid down in s 5 precludes that view: *Shuttleworth v Le Fleming* (1865) 19 CBNS 687. The question was raised in argument in *Mercer v Denne* [1904] 2 Ch 534 (affd [1905] 2 Ch 538, CA), but no decision was given on it. Moreover, a right of common is not taken and enjoyed under the Prescription Act 1832 where the claim made is not a claim to a profit but only a claim to a title in the soil: *Lyell v Lord Hothfield* [1914] 3 KB 911.

3 As the Prescription Act 1832 s 1 expressly mentions 'land of our sovereign lord the King', Crown lands are included.

4 Enjoyment as of right means without force, without secrecy and without permission, but there is no requirement that the user should have any subjective belief that he is entitled to the right: *R v Oxfordshire*

County Council, ex p Sunningwell Parish Council [2000] 1 AC 335, [1999] 3 All ER 385, HL. It must also be user by or on behalf of one fee simple owner against another. Oral or written consents given during the 30 or 60 year period will defeat a claim, as will a written consent given at the beginning of the user. An oral consent, however, given at the beginning will defeat a claim to the 30 year period but not the 60 year period: see *Tickle v Brown* (1836) 4 Ad & El 369; *Bennison v Cartwright* (1864) 5 B & S 1 at 18; *Earl De la Warr v Miles* (1881) 17 ChD 535, CA. As to 'tacit sufferance' see *Gardner v Hodgson's Kingston Brewery Co* [1901] 2 Ch 198 at 217, CA, per Romer LJ; affd [1903] AC 229, HL. See further *Lyell v Lord Hothfield* [1914] 3 KB 911 (where a right of common was not established, the user being contentious and not acquiesced in or consented to by the owner of the servient tenement); *Davis v du Paver* [1953] 1 QB 184, [1952] 2 All ER 991, CA (where a claim to a prescriptive easement of pasturage was rejected on the grounds that there was no evidence that the servient owner had any knowledge of the user).

5 Interruption of the enjoyment must be submitted to or acquiesced in for a year to constitute a break in the enjoyment (Prescription Act 1832 s 4 (amended by the Statute Law Revision (No 2) Act 1888)), but interruptions acquiesced in for less than a year may be of great weight as evidence on the question whether there ever was a commencement of an enjoyment as of right, and are explanatory of what the user really was (*Eaton v Swansea Waterworks Co* (1851) 17 QB 267 at 274 per Lord Campbell CJ). 'Submission to or acquiescence in' is a state of mind evidenced by the conduct of the parties, and it is a question of fact for the judge to decide on all the facts of the case, and it is not to be decided merely by saying that there was in fact a period of a year in which nothing was done, without considering all the surrounding circumstances: see *Davies v du Paver* [1953] 1 QB 184 at 203, [1952] 2 All ER 991 at 999, CA, per Birkett LJ.

Where during any period a right of common claimed over any land was not exercised, but during the whole or part of that period either the land was requisitioned, or, where the right claimed is a right to graze animals, the right could not be or was not exercised for reasons of animal health, that period or part must be left out of account both in determining for the purposes of the Prescription Act 1832 whether there was an interruption within the meaning of that Act of the actual enjoyment of the right and in computing the period of 30 or 60 years: Commons Registration Act 1965 s 16(1) (s 16 repealed in relation to the pilot areas in England by virtue of SI 2000/8/1960; prospectively repealed, in relation to the whole of England and Wales, by the Commons Act 2006 Sch 6 Pt 1, as from a day to be appointed under s 56(1); at the date at which this volume states the law, no such day had been appointed); and see *Tehidy Minerals Ltd v Norman* [1971] 2 QB 528, [1971] 2 All ER 475. As to the pilot areas in England see PARA 467 text and notes 29-30. For these purposes, 'requisitioned' means in the possession of a government department in the exercise or purported exercise of powers conferred by regulations made under the Emergency Powers (Defence) Act 1939 (repealed) or by the Requisitioned Land and War Works Act 1945 Pt VI (ss 28-31): Commons Registration Act 1965 s 16(3) (repealed and prospectively repealed). In determining in any proceedings any question arising under s 16 whether any land was requisitioned during any period, a document purporting to be a certificate to that effect issued by a government department is admissible in evidence: s 16(3) (repealed and prospectively repealed). As to emergency powers and requisitioning see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARAS 820-822; **WAR AND ARMED CONFLICT** vol 49(1) (2005 Reissue) PARA 504 et seq. Where it is necessary for the purposes of s 16 to establish that a right to graze animals could not be or was not exercised for reasons of animal health it is sufficient to prove either: (1) that the movement of animals to that land was prohibited or restricted by or under the Animal Health Act 1981 or any enactment repealed by that Act; or (2) that the land was not, but some other land was, approved for grazing under any scheme in force under the Diseases of Animals Act 1950 (repealed) or any such enactment and the animals were registered, or were undergoing tests with a view to registration, under the scheme: Commons Registration Act 1965 s 16(4) (repealed and prospectively repealed). As to restrictions on the movement of animals see generally **ANIMALS** vol 2 (2008) PARA 1040 et seq.

6 Proof of the user must be shown substantially during the whole period other than the last year next before some suit or action in which the claim is brought in question (*Richards v Fry* (1838) 7 Ad & El 698; cf *Cooper v Hubbuck* (1862) 12 CBNS 456), and particularly in the first year and the last year but one of the period over which the user extends (*Bailey v Appleyard* (1838) 8 Ad & El 161; *Carr v Foster* (1842) 3 QB 581; *Lowe v Carpenter* (1851) 6 Exch 825; *Parker v Mitchell* (1840) 11 Ad & El 788; *Earl De la Warr v Miles* (1881) 17 ChD 535, CA). As to rights which are normally used only intermittently see *White v Taylor (No 2)* [1969] 1 Ch 160, [1968] 1 All ER 1015; and on the question of a temporary non-user for a year, at the beginning or the end or in the middle of the statutory period, see *Hollins v Verney* (1884) 13 QBD 304 at 314-315, CA. In this respect the proof differs from that required in case of a lost grant: see *Gardner v Hodgson's Kingston Brewery Co* [1903] AC 229, HL; and PARA 472. No presumption will be drawn from evidence as to user during part of the period (*Bailey v Appleyard* (1838) 8 Ad & El 161; *Mitcham Common Conservators v Banks* (1912) 76 JP 413); but the user need not necessarily be shown to have been exercised over the whole of the common (*Peardon v Underhill* (1850) 16 QB 120).

7 The Prescription Act 1832 was passed (ie received royal assent) on 1 August 1832.

8 Prescription Act 1832 s 1 (amended by the Statute Law Revision Act 1890).

9 In any action raising the question, not necessarily the pending action: *Cooper v Hubbuck* (1862) 12 CBNS 456.

- 10 As to submission or acquiescence to interruptions see note 5.
- 11 Prescription Act 1832 s 4 (amended by the Statute Law Revision (No 2) Act 1888).
- 12 *Lord Battersea v London City Sewers Comrs* [1895] 2 Ch 708; *Barff v Mann, Crossman and Paulin Ltd* (1905) 49 Sol Jo 794.
- 13 *Gardner v Hodgson's Kingston Brewery Co* [1903] AC 229, HL; and see also *Mitcham Common Conservators v Banks* (1912) 76 JP 413.
- 14 See PARA 403.
- 15 As to the pilot areas in England see PARA 467 text and notes 29-30.
- 16 Ie the Commons Act 2006 Pt 1 (ss 1-25) (not fully in force).
- 17 See the Commons Act 2006 s 6(1) (not fully in force); and PARA 467.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/2. RIGHTS OF COMMON AND RELATED RIGHTS/(3) ALIENATION AND ACQUISITION OF RIGHTS OF COMMON/474. Alienation of rights of common.

(3) ALIENATION AND ACQUISITION OF RIGHTS OF COMMON

474. Alienation of rights of common.

Subject to certain exceptions¹, registered rights of common² can no longer be severed from the land to which they are attached³ and pass on the conveyance of the land⁴. One exception to this rule is that rights can be severed by lease or licence for a period not exceeding two years in England or three years in Wales⁵.

A transfer of an incorporeal hereditament by itself must be by deed⁶, but if actually enjoyed by virtue of a lease not made by deed, rent can be recovered for the enjoyment⁷.

1 See the Commons Act 2006 Sch 1; and PARAS 499-501.

2 As to the meaning of 'rights of common' see PARA 405.

3 See the Commons Act 2006 s 9; and PARA 498. Formerly, an appendant right could not be severed (*Bennett v Reeve* (1740) Willes 227) but appurtenant grazing rights when registered became a severable right to graze a fixed number of animals and the right became common of pasture in gross (see *Bettison v Langton* [2001] UKHL 24, [2002] 1 AC 27, [2001] 3 All ER 417; and PARA 441). As to common of pasture appendant, appurtenant or in gross see PARA 433 et seq. As to registration see PARA 506 et seq.

4 See the Law of Property Act 1925 s 62; and **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 236; **EASEMENTS AND PROFITS A PRENDRE** vol 16(2) (Reissue) PARA 57.

Title to much dominant land is now registered. The Land Registration Act 2002 s 11(3) vests in the registered proprietor on first registration all interests subsisting for the benefit of the legal estate (see **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 835) and the Commons Act 2006 s 9 (see PARA 498) has the effect that the right of common must pass on a disposition in relation to the land (ie a disposition of the legal estate in the land).

5 See the Commons (Severance of Rights) (England) Order 2006, SI 2006/2145, art 2; the Commons (Severance of Rights) (Wales) Order 2007, SI 2007/583, art 2; and PARA 500.

6 See the Law of Property Act 1925 ss 51, 52, 201(1), 205(1)(ii), (ix); and **DEEDS AND OTHER INSTRUMENTS; REAL PROPERTY**. See also *Wood v Leadbitter* (1845) 9 JP 312, 14 LJ Ex 161 (overruled in so far as it relates to licences by *Winter Garden Theatre (London) Ltd v Millennium Productions Ltd* [1948] AC 173, [1947] 2 All ER 331, HL). Therefore a lease (however short) of a right of common without any land will need to be by deed. A lease for up to two years of all of the dominant tenement together with all rights of common attached to the whole taking effect in immediate possession of the land demised at a full rent without a fine (or such a lease of part of the farm with an apportioned part of the rights of common) would appear not to need to be by deed because the rights are attached to a demise of land. A lease of part of the dominant tenement together with all (or more or less than an apportioned part) of the rights of common would probably also not need to be by deed because the regulations cited in note 5 do not appear to affect the form of documentation and the rights will be attached to land for the duration of the lease.

7 *Jones v Reynolds* (1836) 4 Ad & El 805; *Sutton v Temple* (1843) 12 M & W 52 (where the agreement was to take 20 acres of eddish or eatage in a certain parish); *Holford v Pritchard* (1849) 3 Exch 793 (a case involving a right of fishing). The position of a lessee in possession under an agreement for lease which is specifically enforceable is similar to that of a lessee by deed: see **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 76.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/2. RIGHTS OF COMMON AND RELATED RIGHTS/(3) ALIENATION AND ACQUISITION OF RIGHTS OF COMMON/475. Acquisition by the National Trust.

475. Acquisition by the National Trust.

Acquisitions of land by the National Trust¹ do not affect the common or commonable rights² over the land³, except that the National Trust is bound⁴ to keep any property consisting of:

- 93 (1) any land registered as common land⁵;
- 94 (2) land not so registered which is either regulated by an Act made under the Commons Act 1876 confirming a provisional order of the Inclosure Commissioners⁶ or subject to a scheme under the Metropolitan Commons Act 1866⁷ or the Commons Act 1899⁸; and
- 95 (3) land not falling within head (1) or head (2) above which is in the New Forest and is subject to rights of common⁹,

uninclosed and unbuilt on as an open space for the recreation and enjoyment of the public and to resist encroachments¹⁰. The National Trust has also certain special powers in relation to land falling within heads (1) to (3) above which is its property¹¹.

Any common or commonable land the soil of which is vested in the National Trust is deemed to be a common to which statutory provisions relating to gravel digging¹² apply¹³.

1 As to the National Trust Act see **NATIONAL CULTURAL HERITAGE** vol 77 (2010) PARA 979 et seq.

2 As to rights of common, and common and commonable lands generally, see PARA 405 et seq.

3 See the National Trust Act 1907 s 37; and **NATIONAL CULTURAL HERITAGE** vol 77 (2010) PARA 992.

4 Ie except where the National Trust Act 1907 otherwise provides: see s 29(1) (s 29 prospectively amended by the Commons Act 2006 Sch 4 para 3(1)-(4); at the date at which this volume states the law, that amendment was not in force); PARA 618; and **NATIONAL CULTURAL HERITAGE** vol 77 (2010) PARA 992.

5 As to registration see PARAS 403, 506 et seq.

6 As to inclosure see generally PARA 418 et seq; and as to the use of the terms 'inclose', 'inclosure' etc see PARA 418 note 2.

7 As to schemes under the Metropolitan Commons Act 1866 see **LONDON GOVERNMENT**.

8 As to schemes under the Commons Act 1899 see PARA 590 et seq.

9 The registration requirements of the Land Registration Act 1965 and the Commons Act 2006 do not apply to the New Forest: see PARA 509.

10 See the National Trust Act 1907 s 29(1)(A), (E), (2) (as respectively amended and added: see note 4); PARA 618; and **NATIONAL CULTURAL HERITAGE** vol 77 (2010) PARA 992.

11 See the National Trust Act 1907 s 29(1)(B), (C), (D), (F) (as amended: see note 4); PARA 618; and **NATIONAL CULTURAL HERITAGE** vol 77 (2010) PARAS 991-992. There is a general power to charge for admission to common or commonable land which is set apart for athletic sports, or for the use by the public of any facilities or services provided for their enjoyment or convenience, but otherwise no charge may be made for admission to common or commonable land: see the National Trust Act 1907 s 30(2); the National Trust Act 1971 s 23(3); and **NATIONAL CULTURAL HERITAGE** vol 77 (2010) PARA 992. In addition there is a power to erect buildings and carry out works: see s 23(1), (2); and PARA 618.

12 Ie the provisions of the Commons Act 1876 s 20: see PARA 587.

13 See the National Trust Act 1907 s 36. This means that highway authorities may not search for, dig or carry away gravel, sand, stone or other materials without consent or an order of the justices.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/2. RIGHTS OF COMMON AND RELATED RIGHTS/(3) ALIENATION AND ACQUISITION OF RIGHTS OF COMMON/476. Grant or inclosure under special Acts.

476. Grant or inclosure under special Acts.

A grant or inclosure of common purporting to be made under the general authority of certain enabling Acts¹, or any Act incorporating such an Act or any of its provisions, is not valid unless made with the consent of the Secretary of State or the Welsh Ministers², or made to or by a government department, or specially authorised by Act of Parliament³. In giving or withholding consent the Secretary of State or the Welsh Ministers must have regard to the same considerations, and, if necessary, hold the same inquiries, as are required in deciding whether an application under the Inclosure Acts⁴ is to be granted⁵.

1 The Acts listed in the Commons Act 1899 Sch 1 (amended by the Endowments and Glebe Measure 1976 Sch 8; and by the Commons Act 2006 Sch 6 Pt 3; modified by the Compulsory Purchase Act 1965 Sch 7), the most significant of which are the Lands Clauses Consolidation Act 1845 and the Compulsory Purchase Act 1965 Pt I (ss 1-32) (see generally **COMPULSORY ACQUISITION OF LAND**).

2 As to the Secretary of State, and the transfer of functions in relation to Wales to the Welsh Ministers, see PARA 423.

3 Commons Act 1899 s 22(1). As to the use of the terms 'inclose', 'inclosure' etc see PARA 418 note 2; and as to inclosure see generally PARA 418 et seq. The process of inclosure may now be considered obsolete: see further PARA 419 note 1.

4 As to the Inclosure Acts see PARA 419 note 2.

5 Commons Act 1899 s 22(2). As to these inquiries see PARA 419. See in particular the Commons Act 1876 s 7 (provisions for the benefit of a neighbourhood).

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/2. RIGHTS OF COMMON AND RELATED RIGHTS/(3) ALIENATION AND ACQUISITION OF RIGHTS OF COMMON/477. Acquisition under the New Parishes Measure.

477. Acquisition under the New Parishes Measure.

The Church Commissioners¹ have power to acquire land by way of gift, devise or purchase, for use for many ecclesiastical purposes such as the site of a new church². If the land forms part of any common or of the waste of a manor, the lord of the manor or his successor as owner of the soil may, with the consent of the Secretary of State³, convey the land in fee simple free, in effect, from common rights⁴. If the Secretary of State considers that rights of common⁵ are substantially affected he must require compensation to be paid to the commoners⁶.

In relation to the pilot areas in England⁷, where a conveyance made for these purposes⁸ extinguishes a right of common in relation to any registered land⁹, or confers, or vests in any person, a right over other land in exchange for a right which is extinguished, or causes any registered land to cease to be common land or a town or village green, it does not operate at law until, further to the granting of an application for amendment of the register¹⁰, the disposition¹¹ effected by that conveyance is registered in the register of common land or the register of town and village greens¹².

1 The Church Commissioners superseded the Ecclesiastical Commissioners: see **ECCLESIASTICAL LAW**.

2 See the New Parishes Measure 1943 s 13; and **ECCLESIASTICAL LAW**.

3 As to applications for consent see the Works on Common Land, etc (Procedure) (England) Regulations 2007, SI 2007/2588, reg 23; and as to the Secretary of State see **PARA 423**.

4 See the New Parishes Measure 1943 s 15(1) (amended by the Commons Act 2006 Sch 4 para 5). The Commons Act 2006 ss 39, 40 (see **PARAS 613-614**) apply in relation to an application for such consent as they apply in relation to an application for consent under s 38(1) (see **PARA 612**): New Parishes Measure 1943 s 15(1) proviso (as so amended).

5 As to rights of common see generally **PARA 405**.

6 See the New Parishes Measure 1943 s 15(2).

7 As to the pilot areas in England see **PARA 467** text and notes 29-30.

8 I.e a conveyance made for the purposes of the New Parishes Measure 1943 s 13: see the Commons Act 2006 s 14(3)(b) (not fully in force) (definition applied by the Commons Registration (England) Regulations 2008, SI 2008/1961, reg 45(3)(b)).

9 For these purposes, 'registered land' means land registered as common land or as a town or village green: Commons Registration (England) Regulations 2008, SI 2008/1961, reg 2(1). As to the meaning of 'land' see **PARA 403** note 1; as to the meanings of 'land registered as common land' and 'land registered as a town or village green' see **PARA 424** notes 7, 12.

10 I.e an application made under the Commons Registration (England) Regulations 2008, SI 2008/1961, Sch 4 para 8: see **PARA 544**.

11 For these purposes, 'disposition' means a disposition to which the Commons Registration (England) Regulations 2008, SI 2008/1961, Sch 4 para 8 (see **PARA 544**) applies: reg 45(3)(a).

12 See the Commons Registration (England) Regulations 2008, SI 2008/1961, reg 45(1)(a)(i), (c), (d), (2); and **PARA 544**.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/2. RIGHTS OF COMMON AND RELATED RIGHTS/(3) ALIENATION AND ACQUISITION OF RIGHTS OF COMMON/478. Acts incorporating the Lands Clauses Consolidation Act 1845.

478. Acts incorporating the Lands Clauses Consolidation Act 1845.

Statutes incorporating the Lands Clauses Consolidation Act 1845 may confer power to purchase compulsorily or by agreement. In either case the special provisions of that Act relating to compensation for common lands¹ will apply to the acquisition actually or, while it still rests in negotiation, potentially, unless they are excluded by the special Act. These provisions are considered below².

1 Ie the Lands Clauses Consolidation Act 1845 ss 99-107: see PARAS 484-486.

2 See PARA 484 et seq.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/2. RIGHTS OF COMMON AND RELATED RIGHTS/(4) COMPULSORY ACQUISITION/(i) Compulsory Purchase Powers/479. Powers of appropriation of common land.

(4) COMPULSORY ACQUISITION

(i) Compulsory Purchase Powers

479. Powers of appropriation of common land.

Statutory powers enable the appropriation of common land for allotments, housing, and other development purposes, although in all cases the powers of appropriation are fettered for the purposes of protecting rights of common where possible¹.

In relation to the pilot areas in England², where any order, deed or other instrument made under or pursuant to the Acquisition of Land Act 1981, or any other instrument made under or pursuant to any enactment³, extinguishes a right of common in relation to any registered land⁴, or confers, or vests in any person, a right over other land in exchange for a right which is extinguished, or causes any registered land to cease to be common land or a town or village green, it does not operate at law until, further to the granting of an application for amendment of the register⁵, the disposition⁶ effected by that order, deed or instrument is registered in the register of common land or the register of town and village greens⁷.

¹ In connection with appropriation for allotments see the Land Settlement (Facilities) Act 1919 ss 22(1), 28(1), (2); and **AGRICULTURAL LAND** vol 1 (2008) PARA 552. In connection with appropriation for housing and other development see the Town and Country Planning Act 1990 s 229; the Acquisition of Land Act 1981 s 19; PARA 481 et seq; and **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARAS 531, 604; **TOWN AND COUNTRY PLANNING** vol 46(2) (Reissue) PARA 947.

² As to the pilot areas in England see PARA 467 text and notes 29-30.

³ See the Commons Act 2006 s 14(3)(a), (c) (not fully in force) (definition applied by the Commons Registration (England) Regulations 2008, SI 2008/1961, reg 45(3)(b)).

⁴ As to the meaning of 'registered land' see PARA 477 note 9.

⁵ Ie an application made under the Commons Registration (England) Regulations 2008, SI 2008/1961, Sch 4 para 8: see PARA 544.

⁶ As to the meaning of 'disposition' see PARA 477 note 11.

⁷ See the Commons Registration (England) Regulations 2008, SI 2008/1961, reg 45(1)(a)(i), (c), (d), (2); and PARA 544.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/2. RIGHTS OF COMMON AND RELATED RIGHTS/(4) COMPULSORY ACQUISITION/(i) Compulsory Purchase Powers/480. Acquisition under private Acts etc.

480. Acquisition under private Acts etc.

The standing orders of both Houses of Parliament make various requirements which have to be observed by the promoters of private bills that include powers to take common lands¹. If a Bill is passed specially authorising the acquisition of certain common lands, unless the private Act so provides, the acquisition will not require the consent of the Secretary of State or the Welsh Ministers². Such Acts, however, usually incorporate the relevant provisions of the Lands Clauses Consolidation Act 1845³ or the Compulsory Purchase Act 1965⁴, and the provisions of those Acts regarding compensation for common lands and their conveyance accordingly apply⁵.

In relation to the pilot areas in England⁶, where any instrument made under or pursuant to any enactment⁷ extinguishes a right of common in relation to any registered land⁸, or confers, or vests in any person, a right over other land in exchange for a right which is extinguished, or causes any registered land to cease to be common land or a town or village green, it does not operate at law until, further to the granting of an application for amendment of the register⁹, the disposition¹⁰ effected by that instrument is registered in the register of common land or the register of town and village greens¹¹.

1 As to the requirements to be observed by promoters of all private Bills see **PARLIAMENT** vol 34 (Reissue) PARA 845 et seq.

2 See the Commons Act 1899 s 22(1)(a); and PARA 476. As to the Secretary of State, and the transfer of functions in relation to Wales to the Welsh Ministers, see PARA 423.

3 The Lands Clauses Consolidation Act 1845 may alternatively apply, by virtue of s 1, without being expressly incorporated.

4 See **COMPULSORY ACQUISITION OF LAND**.

5 See the Lands Clauses Consolidation Act 1845 ss 99-107; the Compulsory Purchase Act 1965 Sch 4; and PARA 484 et seq.

6 As to the pilot areas in England see PARA 467 text and notes 29-30.

7 See the Commons Act 2006 s 14(3)(c) (not fully in force) (definition applied by the Commons Registration (England) Regulations 2008, SI 2008/1961, reg 45(3)(b)).

8 As to the meaning of 'registered land' see PARA 477 note 9.

9 Ie an application made under the Commons Registration (England) Regulations 2008, SI 2008/1961, Sch 4 para 8: see PARA 544.

10 As to the meaning of 'disposition' see PARA 477 note 11.

11 See the Commons Registration (England) Regulations 2008, SI 2008/1961, reg 45(1)(a)(i), (c), (d), (2); and PARA 544.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/2. RIGHTS OF COMMON AND RELATED RIGHTS/(4) COMPULSORY ACQUISITION/(i) Compulsory Purchase Powers/481. Acquisition by compulsory purchase order.

481. Acquisition by compulsory purchase order.

Powers of compulsory purchase of land contained in modern public general Acts are usually made exercisable subject to the procedure laid down by the Acquisition of Land Act 1981¹. In such cases, the substantive provisions of the Compulsory Purchase Act 1965², including, in particular, those provisions relating to compensation for and conveyance of common land³, apply⁴.

A compulsory purchase order which is to authorise the purchase of certain land⁵ forming part of a common⁶ is subject to special parliamentary procedure⁷, unless the Secretary of State or the Welsh Ministers⁸ is or are satisfied and certifies or certify that similar land is being exchanged for the land being acquired⁹, that the land is being purchased in order to secure its preservation or improve its management¹⁰, that the land does not exceed 250 square yards in extent¹¹, or that the land is required for highway maintenance or improvement¹². If it is proposed to give such a certificate the Secretary of State or the Welsh Ministers must direct the acquiring authority¹³ to give public notice¹⁴ of the intention to do so and afford opportunity to all persons interested to make representations and objections, and in any case where it appears to be expedient, having regard to any representations or objections made, a public local inquiry must be held¹⁵. The Secretary of State or the Welsh Ministers may then, after considering any representations and objections made and, if an inquiry has been held, the report of the person who held it, give the certificate¹⁶. As soon as may be after the giving of the certificate, the acquiring authority must publish in one or more local newspapers circulating in the locality in which the land comprised in the order is situated a notice in the prescribed form stating that the certificate has been given¹⁷. An appeal may be made to the High Court by any person aggrieved by the certificate or the compulsory purchase order¹⁸.

In relation to the pilot areas in England¹⁹, where the order²⁰ extinguishes a right of common in relation to any registered land²¹, or confers, or vests in any person, a right over other land in exchange for a right which is extinguished, or causes any registered land to cease to be common land or a town or village green, it does not operate at law until, further to the granting of an application for amendment of the register²², the disposition²³ effected by that order is registered in the register of common land or the register of town and village greens²⁴.

1 See the Acquisition of Land Act 1981 s 1(1); and **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARA 557. See also eg the Forestry Act 1967 s 40, Sch 5; and **FORESTRY** vol 52 (2009) PARA 43 et seq. The application of the Acquisition of Land Act 1981 to the compulsory purchase of land, and the provisions relating to the protection of common land thereby applied (see the text and notes 2-18), extends to the compulsory purchase of land for the construction or operation of railways, tramways and inland waterways: see the Transport and Works Act 1992 s 12; and **RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES** vol 39(1A) (Reissue) PARAS 313, 530; **ROAD TRAFFIC** vol 40(3) (2007 Reissue) PARA 1585 et seq.

2 Ie the Compulsory Purchase Act 1965 Pt I (ss 1-32): see PARA 484 et seq; and **COMPULSORY ACQUISITION OF LAND**.

3 Ie the Compulsory Purchase Act 1965 s 21, Sch 4: see PARA 484 et seq.

4 See the Compulsory Purchase Act 1965 s 1(1) (substituted by the Acquisition of Land Act 1981 Sch 4).

5 For the purposes of the Acquisition of Land Act 1981, 'land' includes messuages, tenements and hereditaments and, in relation to compulsory purchase under any enactment, includes anything falling within the definition of that expression within that enactment: s 7(1).

6 For these purposes and for the purposes of the New Towns Act 1981 (see PARA 482) 'common' includes any land subject to be inclosed under the Inclosure Acts 1845 to 1882 and any town or village green: Acquisition of Land Act 1981 s 19(4); New Towns Act 1981 s 80(1). As to the Inclosure Acts see PARA 419 note 2; and as to the use of the terms 'inclose', 'inclosure' etc see PARA 418 note 2. As to inclosure see generally PARA 418 et seq. As to land which may be registered in England and Wales as a town or village green under the Commons Act 2006 see s 15; and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 541.

7 This requirement was preserved as provided for in the Acquisition of Land Act 1981 s 18 (acquisition of National Trust land) and Sch 3 para 5 (transitional provisions) when functions in relation to land in Wales were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. As to the exercise of functions by the Welsh Ministers see PARA 423; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**; and as to special parliamentary procedure see **PARLIAMENT** vol 34 (Reissue) PARA 912 et seq. Where special parliamentary procedure was not adopted in such a case, the compulsory purchase order was quashed: *Richardson v Minister of Housing and Local Government* (1956) 8 P & CR 29.

8 As to the Secretary of State, and the transfer of functions in relation to Wales to the Welsh Ministers, see PARA 423.

9 le (1) that there has been or will be given in exchange for such land other land, not being less in area but being equally advantageous to the persons, if any, entitled to rights of common or other rights, and to the public; and (2) that the land given in exchange has been or will be vested in the persons in whom the land purchased was vested, subject to the like rights, trusts and incidents as attach to the land purchased: Acquisition of Land Act 1981 s 19(1)(a). For a consideration of the concept of land being 'equally advantageous' see *Greenwich London Borough Council v Secretary of State for the Environment* [1994] JPL 607. As to rights of common see generally PARA 405 et seq. As to substituted and new common land see PARAS 517, 521 et seq. Unless the Secretary of State has, or the Welsh Ministers have, certified that land is being purchased in order to secure its preservation or improve its management (see the text and note 10), a compulsory purchase order may provide for the vesting of land given in exchange in the persons, and subject to the rights, trusts and incidents mentioned in the Acquisition of Land Act 1981 s 19(1), and for discharging the land purchased from all rights, trusts and incidents to which it was previously subject: s 19(3) (s 19(1)(aa), (2A) added, and s 19(2), (3) amended, by the Planning and Compensation Act 1981 Sch 15 para 12(1)).

10 Acquisition of Land Act 1981 s 19(1)(aa) (as added: see note 9).

11 Acquisition of Land Act 1981 s 19(1)(b).

12 le that the land is required for the widening or drainage of an existing highway, or partly for the widening and partly for the drainage of such a highway, and that the giving in exchange of other land is unnecessary, whether in the interests of the persons, if any, entitled to rights of common or other rights or in the interests of the public: Acquisition of Land Act 1981 s 19(1)(b).

13 'Acquiring authority' means the minister, local authority or other person who may be authorised to purchase the land compulsorily: Acquisition of Land Act 1981 s 7(1).

14 Notice must be given in such form and manner as the Secretary of State or the Welsh Ministers may direct: Acquisition of Land Act 1981 s 19(2A) (as added: see note 9).

15 Acquisition of Land Act 1981 s 19(2) (as amended: see note 11). As to the statutory provisions relating to inquiries see s 5; and **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARAS 595, 600. As to the importance of giving an accurate description of the land in the notice see *Wilson v Secretary of State for the Environment* [1974] 1 All ER 428, [1973] 1 WLR 1083.

16 Acquisition of Land Act 1981 s 19(2).

17 Acquisition of Land Act 1981 s 22. 'Prescribed' means prescribed by regulations made by the Secretary of State or the Welsh Ministers by statutory instrument: s 7(1), (2). For the prescribed form of notice see the Compulsory Purchase of Land (Prescribed Forms) (Ministers) Regulations 2004, SI 2004/2595, Schedule, Form 12; the Compulsory Purchase of Land (Prescribed Forms) (National Assembly for Wales) Regulations 2004, SI 2004/2732, Schedule, Form 12.

18 See the Acquisition of Land Act 1981 s 23; and **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARA 612. As to the scope of appeals see *Greenwich London Borough Council v Secretary of State for the Environment* [1994] JPL 607.

19 As to the pilot areas in England see PARA 467 text and notes 29-30.

20 See the Commons Act 2006 s 14(3)(a) (not fully in force) (definition applied by the Commons Registration (England) Regulations 2008, SI 2008/1961, reg 45(3)(b)).

21 As to the meaning of 'registered land' see PARA 477 note 9.

22 Ie an application made under the Commons Registration (England) Regulations 2008, SI 2008/1961, Sch 4 para 8: see PARA 544.

23 As to the meaning of 'disposition' see PARA 477 note 11.

24 See the Commons Registration (England) Regulations 2008, SI 2008/1961, reg 45(1)(a)(i), (c), (d), (2); and PARA 544.

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482. Acquisition under the New Towns Act 1981.

Where a compulsory purchase order under the New Towns Act 1981¹ authorises an acquiring authority² to purchase land forming part of any common³, the order is subject to special parliamentary procedure if it relates to land in England or certain land in Wales⁴ unless it is excepted⁵. The first exception arises where the Secretary of State is, or the Welsh Ministers are, satisfied that similar land is being exchanged for the land being acquired⁶; the second where he is, or they are, satisfied that the land is required for the widening of an existing highway⁷. In either case the Secretary of State or the Welsh Ministers must certify accordingly⁸. If the Secretary of State or the Welsh Ministers proposes or propose to certify, he or they must give public notice of the intention and afford opportunity to all persons interested to make representations and objections, cause a public local inquiry to be held if it appears to be expedient so to do, having regard to any representations or objections made, and consider the representations and objections and the report of the person who made the inquiry⁹. As soon as may be after the giving of a certificate, the acquiring authority must publish in the London Gazette and locally advertise¹⁰ a notice in the prescribed form¹¹ stating that the certificate has been given¹². The compulsory purchase order generally becomes operative when the notice of its being made or confirmed is first published¹³, unless the order is subject to special parliamentary procedure, in which case its commencement is determined by the enactment governing that procedure¹⁴. In relation to the pilot areas in England¹⁵, however, where the order¹⁶ extinguishes a right of common in relation to any registered land¹⁷, or confers, or vests in any person, a right over other land in exchange for a right which is extinguished, or causes any registered land to cease to be common land or a town or village green, it does not operate at law until, further to the granting of an application for amendment of the register¹⁸, the disposition¹⁹ effected by that order is registered in the register of common land or the register of town and village greens²⁰.

1 As to compulsory purchase under the New Towns Act 1981 see **TOWN AND COUNTRY PLANNING** vol 46(3) (Reissue) PARA 1333 et seq.

2 In relation to the acquisition under or for the purposes of the New Towns Act 1981 of any land (whether compulsorily or by agreement) or to a proposal so to acquire any land, 'acquiring authority' means the development corporation, local highway authority or Minister of the Crown by whom the land is or is proposed to be acquired: s 80(1). As to development corporations see s 3; and **TOWN AND COUNTRY PLANNING** vol 46(3) (Reissue) PARA 1322. As to local highway authorities see the Highways Act 1980 Pt I (ss 1-9); and **HIGHWAYS, STREETS AND BRIDGES**. For the purposes of the New Towns Act 1981 'land' includes messuages, tenements, and hereditaments, houses and buildings of any tenure: s 80(1).

3 As to the meaning of 'common' see PARA 481 note 6.

4 This requirement was preserved only to the extent provided for under the New Towns Act 1981 Sch 4 para 12(b) (acquisition of National Trust land) when functions in relation to land in Wales were transferred in 1999 to the National Assembly of Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. As to the exercise of those functions by the Welsh Ministers see PARA 423; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**; and as to special parliamentary procedure see **PARLIAMENT** vol 34 (Reissue) PARA 912 et seq.

5 See the New Towns Act 1981 ss 10, 11, 13, Sch 4 para 13(1); the text and notes 6-8; and **TOWN AND COUNTRY PLANNING** vol 46(3) (Reissue) PARA 1333 et seq.

6 Ie (1) that there has been or will be given in exchange for such land other land, not less in area and equally advantageous to the persons, if any, entitled to rights of common or other rights, and to the public; and

(2) that the land given in exchange has been or will be vested in the persons in whom the land acquired was vested, subject to the like rights, trusts and incidents as attached to the land acquired: New Towns Act 1981 Sch 4 para 13(1)(a) (Sch 4 para 13(1), (2) amended by SI 1985/442). For a consideration of the concept of land being 'equally advantageous' see *Greenwich London Borough Council v Secretary of State for the Environment* [1994] JPL 607. As to rights of common see generally PARA 405 et seq. As to substituted and new common land see PARAS 517, 521 et seq. A compulsory purchase order may provide for the vesting of land given in exchange in the persons, and subject to the rights, trusts and incidents mentioned in the New Towns Act 1981 Sch 4 para 13(1), and for discharging the land purchased from all rights, trusts and incidents to which it was previously subject: Sch 4 para 13(3).

As to the Secretary of State, and the transfer of functions in relation to Wales to the Welsh Ministers, see PARA 423.

7 Ie that the land is required for the widening of an existing highway and that the giving in exchange of other land is unnecessary, whether in the interests of the persons, if any, entitled to rights of common or other rights or in the interests of the public: New Towns Act 1981 Sch 4 para 13(1)(b) (as amended: see note 6).

8 New Towns Act 1981 Sch 4 para 13(1). There is a right to question the validity of a certificate by application to the High Court on limited grounds by a procedure analogous to that available under the Acquisition of Land Act 1981 ss 23, s 24 (see **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARAS 612, 614): see the New Towns Act 1981 Sch 4 para 14. As to the scope of appeals see *Greenwich London Borough Council v Secretary of State for the Environment* [1994] JPL 607.

9 New Towns Act 1981 Sch 4 para 13(2) (as amended: see note 6). As to the statutory provisions relating to inquiries see the Acquisition of Land Act 1981 s 5; and **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARAS 595, 600.

10 Ie publish, in each of two successive weeks, in one or more newspapers circulating in the locality in which the land is situated: New Towns Act 1981 Sch 4 para 13(4).

11 Ie prescribed by regulations: New Towns Act 1981 s 80(1). For the prescribed form of notice under Sch 4 para 13(4) see, by virtue of the Interpretation Act 1978 ss 17(2), 23(2), the New Towns (Compulsory Purchase of Land) Regulations 1977, SI 1977/549, Schedule, Form 10.

12 New Towns Act 1981 Sch 4 para 13(4).

13 New Towns Act 1981 Sch 4 para 15(b).

14 See the New Towns Act 1981 Sch 4 para 16. See further the Statutory Orders (Special Procedure) Act 1945 s 6; and **PARLIAMENT** vol 34 (Reissue) PARAS 925-926.

15 As to the pilot areas in England see PARA 467 text and notes 29-30.

16 See the Commons Act 2006 s 14(3)(c) (not fully in force) (definition applied by the Commons Registration (England) Regulations 2008, SI 2008/1961, reg 45(3)(b)).

17 As to the meaning of 'registered land' see PARA 477 note 9.

18 Ie an application made under the Commons Registration (England) Regulations 2008, SI 2008/1961, Sch 4 para 8: see PARA 544.

19 As to the meaning of 'disposition' see PARA 477 note 11.

20 See the Commons Registration (England) Regulations 2008, SI 2008/1961, reg 45(1)(a)(i), (c), (d), (2); and PARA 544.

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483. Acquisition for armed forces.

The Secretary of State¹ is empowered by the Defence Acts² to acquire land for naval, military or air force purposes or for the purposes of a visiting force or for the defence of the realm³. So far as the acquisition of common land is concerned, the Defence Act 1854 makes available the provisions of the Lands Clauses Consolidation Act 1845⁴ for the purpose of the ascertainment and payment of compensation for, and the extinguishment of, all rights of common and commonable rights in, over or affecting any lands compulsorily purchased⁵.

There is also a general power for the Secretary of State, when acquiring common land for defence purposes, to use the provisions of the Lands Clauses Consolidation Act 1845 regarding extinguishment and compensation for common lands⁶, and for that purpose the Lands Clauses Consolidation Act 1845 is incorporated in the Defence Acts⁷. The sanction of Parliament is not required in the case of land acquired under the Defence Acts.

Where land has been acquired for military purposes, the Secretary of State may make byelaws for securing the public from danger⁸, but no right of common may be taken away or prejudicially affected by those byelaws⁹.

Common lands may also be affected temporarily by military manoeuvres carried out within limits and during periods specified by Orders in Council¹⁰.

Where land to be acquired under the Defence Acts consists of or includes the whole or any part of any common to which the public have rights of access, land may be purchased by agreement with a view to its being exchanged for all or any of the first-mentioned land or with a view to its being substituted for that land otherwise than by way of exchange¹¹.

In relation to the pilot areas in England¹², where an instrument under the Defence Acts¹³ extinguishes a right of common in relation to any registered land¹⁴, or confers, or vests in any person, a right over other land in exchange for a right which is extinguished, or causes any registered land to cease to be common land or a town or village green, it does not operate at law until, further to the granting of an application for amendment of the register¹⁵, the disposition¹⁶ effected by that instrument is registered in the register of common land or the register of town and village greens¹⁷.

1 le, for these purposes, the Secretary of State for Defence, as to whom see **ARMED FORCES** vol 2(2) (Reissue) PARA 2.

2 As to the Acts which may be cited as the Defence Acts, and the general scope and effect of those Acts, see **ARMED FORCES** vol 2(2) (Reissue) PARA 125.

3 For a fuller treatment of the Defence Acts see **ARMED FORCES** vol 2(2) (Reissue) PARA 119 et seq.

4 le the Lands Clauses Consolidation Act 1845 ss 99-107: see PARA 484 et seq.

5 See the Defence Act 1854 s 1. For example, the Act was used in combination with the Defence Acts 1842 and 1854 to extinguish rights of common at RAF Fylingdales in 1960, at RAF Lakenheath in 1961 and at RAF Woodbridge in 1964. The Defence Act 1854 also provides for purchase if an inclosure of a common is in progress (see s 3); however, the process of inclosure may now be considered obsolete (see further PARA 419 note 1), and this provision is accordingly moribund. As to the use of the terms 'inclose', 'inclosure' etc see PARA 418 note 2; and as to inclosure see generally PARA 418 et seq.

6 See note 4.

7 See the Lands Clauses Consolidation Acts Amendment Act 1860 s 7; and **ARMED FORCES** vol 2(2) (Reissue) PARA 125. The purposes for which land, or rights in or over land, may be acquired by the Secretary of State for Defence under the Defence Acts or the Lands Clauses Consolidation Acts Amendment Act 1860 s 7 include any purpose of his department or of any of Her Majesty's naval, military or air forces: Defence (Transfer of Functions) Act 1964 s 2(3).

8 See the Military Lands Act 1892 s 14; and **ARMED FORCES** vol 2(2) (Reissue) PARA 124. This provision applies in relation to land acquired for any of the purposes mentioned in note 7: Defence (Transfer of Functions) Act 1964 s 2(3).

9 Military Lands Act 1892 s 14. In connection with the impact of byelaws on rights of common see *DPP v Hutchinson* [1990] 2 AC 783, [1990] 2 All ER 836, HL (byelaw over Greenham Common was held invalid as it took away or prejudicially affected rights of common).

In practice, much land used for Ministry of Defence training is and remains common land, such as a large proportion of Dartmoor. This is done by agreement under arrangements with the landowners. Byelaws control access by commoners (and by the public) while training is in progress but subject to that the rights of common are not affected.

10 See the Manoeuvres Act 1958 s 1; and **ARMED FORCES** vol 2(2) (Reissue) PARAS 95-96.

11 See the Requisitioned Land and War Works Act 1945 s 53(1); and **ARMED FORCES** vol 2(2) (Reissue) PARA 125. The Secretary of State has power by order to vest the substituted land in the persons in whom the common land was vested, subject to the same rights, trusts and incidents; where the land is not provided by way of exchange, the persons in whom it is to be vested and the rights, trusts and incidents to which it is to be subject are such as may be specified in the order: s 53(2).

12 As to the pilot areas in England see PARA 467 text and notes 29-30.

13 See the Commons Act 2006 s 14(3)(c) (not fully in force) (definition applied by the Commons Registration (England) Regulations 2008, SI 2008/1961, reg 45(3)(b)).

14 As to the meaning of 'registered land' see PARA 477 note 9.

15 In an application made under the Commons Registration (England) Regulations 2008, SI 2008/1961, Sch 4 para 8: see PARA 544.

16 As to the meaning of 'disposition' see PARA 477 note 11.

17 See the Commons Registration (England) Regulations 2008, SI 2008/1961, reg 45(1)(a)(i), (c), (d), (2); and PARA 544.

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(ii) Procedure on Compulsory Purchase

A. ACQUISITION OF RIGHTS

484. Compensation of owner of soil and conveyance.

Where lands subject to rights of common are compulsorily acquired, compensation is payable both in respect of the right in the soil and in respect of the commonable and other rights exercisable over the land in question. Compensation in respect of the rights in the soil is payable to the lord of the manor or to such other party as may be entitled; while compensation in respect of the commonable and other rights is payable to the commoners¹. Payment of compensation extinguishes all commonable and other rights over the land² but does not necessarily extinguish public rights of access³.

Upon payment or tender to the freeholder (that is, the lord of the manor or other party having rights in the soil) of the compensation to which he is entitled, or upon payment into court, the freeholder executes a conveyance or transfer to the acquiring authority, which has the effect of vesting the land in the acquiring authority as if the party conveying had been seised in fee simple of the land at the time of executing the conveyance or transfer⁴. In default of a conveyance or transfer, the acquiring authority may execute a deed poll, vesting the land absolutely in the authority, subject, however, to any commonable or other rights until such rights are extinguished by payment or deposit of the compensation⁵. The acquiring authority is not entitled to take possession of the land until the compensation has been ascertained and paid⁶.

Where the owner of the soil is entitled also to commonable or other rights, those rights are assessed in the same manner as the rights of the commoners⁷.

1 Lands Clauses Consolidation Act 1845 s 99; Compulsory Purchase Act 1965 Sch 4 para 1.

2 Lands Clauses Consolidation Act 1845 s 99 (ss 99, 100 amended by the Administration of Justice Act 1965 s 17(1), Sch 1; prospectively amended by the Constitutional Reform Act 2005 Sch 11 Pt 4 para 9(1), (2), as from 1 October 2009); Compulsory Purchase Act 1965 Sch 4 para 1(1). See further, however, PARA 486.

3 See *Lewis v Mid Glamorgan County Council* [1995] 1 All ER 760, [1995] 1 WLR 313, HL.

4 Lands Clauses Consolidation Act 1845 s 100 (as amended: see note 2); Compulsory Purchase Act 1965 Sch 4 para 2(1), (2).

5 Lands Clauses Consolidation Act 1845 s 100; Compulsory Purchase Act 1965 Sch 4 para 2(3). See further PARA 486.

6 *Stoneham v London, Brighton and South Coast Rly Co* (1871) LR 7 QB 1.

7 Lands Clauses Consolidation Act 1845 s 99 (as amended: see note 2); Compulsory Purchase Act 1965 Sch 4 para 1(2). See also PARA 485 et seq.

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485. Agreement or assessment of compensation on acquisition of commonable or other rights.

The compensation to be paid for the commonable and other rights in or over common lands¹, and also the compensation for the soil where the right in the soil belongs to the commoners, is to be determined, if possible, by agreement between the acquiring authority and a committee of commoners appointed for the purpose². For the purpose of appointing this committee a meeting of the parties entitled to commonable or other rights must be convened by the acquiring authority, by public advertisement, at some convenient place in the neighbourhood of the common³.

The meeting may appoint a committee, not exceeding five in number, of the parties entitled to commonable or other rights, and at the meeting the decision of the majority of the persons entitled to commonable rights present binds the minority and all absent parties⁴.

The committee is empowered to enter into an agreement with the acquiring authority, which binds all the commoners, for the compensation to be paid for the extinction of all commonable and other rights and all matters relating thereto, and may receive the compensation; and the receipt of the committee or of any three of its members is an effectual discharge⁵. The committee must then apportion the compensation among the several persons interested according to their respective interests, but the acquiring authority is not bound to see to the apportionment or to the application of the compensation and is not liable for its misapplication or non-application⁶. If, however, the committee and the acquiring authority fail to agree, the amount of compensation is to be determined by the Lands Chamber of the Upper Tribunal⁷. If, upon being duly convened by the acquiring authority, no effectual meeting takes place, or if the meeting fails to appoint a committee, the compensation is to be determined by a surveyor selected from the members of that chamber⁸.

The provisions described above are, however, not imperative so as to preclude specific performance of an agreement which does not strictly comply with them⁹.

1 These include any commonable or other rights of the lord of the manor or other owner of the soil: see PARA 484.

2 Lands Clauses Consolidation Act 1845 s 101; Compulsory Purchase Act 1965 Sch 4 para 3. An exchange of land does not necessarily preclude the payment of compensation: see *Mackay v City of London Corp* (1966) 17 P & CR 264. Under the Commons Act 2006 s 32 (see PARA 605), a commons council may have power to dispose of land (see s 32(2)(d)); the powers of such a council do not specifically include agreeing compensation for acquisition but may be comprised within s 32(2)(d) or s 31(1)(c) (the 'management' of rights of common: see PARA 604). In the absence of such express powers, the procedure under the Lands Clauses Consolidation Act 1845 remains relevant. An informal committee, not formally appointed, has no power to bind commoners without their agreement: see, in a different context, *Hall v Moore* [2009] EWCA Civ 201, [2009] All ER (D) 235 (Mar).

3 Lands Clauses Consolidation Act 1845 s 102; Compulsory Purchase Act 1965 Sch 4 para 4(1), (4). If the land is parcel of or held of a manor, the lord is entitled to notice of the meeting: Lands Clauses Consolidation Act 1845 s 102; Compulsory Purchase Act 1965 Sch 4 para 4(4).

4 Lands Clauses Consolidation Act 1845 s 103; Compulsory Purchase Act 1965 Sch 4 para 4(5).

5 Lands Clauses Consolidation Act 1845 s 104; Compulsory Purchase Act 1965 Sch 4 para 5(1), (2).

6 Lands Clauses Consolidation Act 1845 s 104; Compulsory Purchase Act 1965 Sch 4 para 5(3). An alternative method of apportionment is available: see PARA 487.

7 Lands Clauses Consolidation Act 1845 s 105; Land Compensation Act 1961 s 1 (amended by SI 2009/1307); Compulsory Purchase Act 1965 Sch 4 para 5(4) (amended by SI 2009/1307). As to the constitution of the Upper Tribunal (which replaced the Lands Tribunal with effect from 1 June 2009) see the Tribunals, Courts and Enforcement Act 2007 Pt 1 (ss 1-49); and **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) para 13A. as to the functions of the Lands Chamber of the Upper Tribunal see the First-tier Tribunal and Upper Tribunal (Chambers) Order 2008, SI 2008/2684, art 9 (added by SI 2009/1021); and as to the jurisdiction of that chamber in relation to compulsory acquisition of land see **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARA 721.

8 Lands Clauses Consolidation Act 1845 s 106 (amended by the Compulsory Purchase Act 1965 Sch 8 Pt III); Lands Tribunal Act 1949 ss 1(6), 3(2) (amended by SI 2009/1307; the Lands Tribunal Act 1949 also amended by the Land Compensation Act 1961 Sch 4 para 8; and by the Compulsory Purchase Act 1965 Sch 8 Pt III); Compulsory Purchase Act 1965 Sch 4 para 6 (amended by SI 2009/1307).

9 *Bee v Stafford and Uttoxeter Rly Co* (1875) 23 WR 868.

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486. Payment of compensation to commoners.

Upon payment or tender to the committee¹, or, if no committee has been appointed, upon payment into court, of the agreed or determined compensation, the acquiring authority may execute a deed poll, as in other cases of purchase of lands, and thereupon the lands will vest in the authority freed and discharged from all commonable and other rights, and the authority becomes entitled to immediate possession². Notwithstanding this provision, it has been held that the payment of compensation under the procedure set out in the Compulsory Purchase Act 1965 does not necessarily extinguish public rights of access over the land³. Further, in relation to the pilot areas in England⁴, where an instrument under an enactment⁵ extinguishes a right of common in relation to any registered land⁶, or confers, or vests in any person, a right over other land in exchange for a right which is extinguished, or causes any registered land to cease to be common land or a town or village green, it does not operate at law until, further to the granting of an application for amendment of the register⁷, the disposition⁸ effected by that instrument is registered in the register of common land or the register of town and village greens⁹.

The court may order payment of the compensation to the committee or make such other order as it thinks fit¹⁰.

1 As to the appointment of the committee see PARA 485; and as to apportionment of the compensation received by the committee see PARA 487. As to whether the functions of the committee may be exercised by a commons council see PARA 485 note 2.

2 Lands Clauses Consolidation Act 1845 s 107 (amended by the Statute Law Revision Act 1892; and the Administration of Justice Act 1965 ss 17, 34, Schs 1, 2; prospectively amended by the Constitutional Reform Act 2005 Sch 11 Pt 4 para 9(1), (2), as from 1 October 2009); Compulsory Purchase Act 1965 Sch 4 para 7(1), (2). See also *Nash v Coombs* (1868) LR 6 Eq 51 at 58.

3 See *Lewis v Mid Glamorgan County Council* [1995] 1 All ER 760, [1995] 1 WLR 313, HL (land remained waste of the manor and was therefore common land for the purposes of the Commons Registration Act 1965 (see s 22(1); and PARA 407)).

4 As to the pilot areas in England see PARA 467 text and notes 29-30.

5 See the Commons Act 2006 s 14(3)(c) (not fully in force) (definition applied by the Commons Registration (England) Regulations 2008, SI 2008/1961, reg 45(3)(b)).

6 As to the meaning of 'registered land' see PARA 477 note 9.

7 Ie an application made under the Commons Registration (England) Regulations 2008, SI 2008/1961, Sch 4 para 8: see PARA 544.

8 As to the meaning of 'disposition' see PARA 477 note 11.

9 See the Commons Registration (England) Regulations 2008, SI 2008/1961, reg 45(1)(a)(i), (c), (d), (2); and PARA 544.

10 Lands Clauses Consolidation Act 1845 s 107 (as amended: see note 2); Compulsory Purchase Act 1965 Sch 4 para 7(3).

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Apportionment or investment of compensation.

B. APPORTIONMENT AND APPLICATION OF COMPENSATION MONEY

487. Apportionment or investment of compensation.

The Lands Clauses Consolidation Act 1845 originally provided that the compensation when received by the committee¹ should be apportioned by it among the several persons interested therein according to their respective interests; but as it was found that in many cases this was a task beyond its powers, the committee has been empowered, when it was of opinion that the provisions of the Lands Clauses Acts could not be satisfactorily carried into effect, to apply in writing to the Secretary of State or the Welsh Ministers (formerly the Inclosure Commissioners)² to call a meeting of the persons interested in the compensation money for the appointment of trustees of the money and for the giving of instructions as to investment of the money and application of the income to such purposes, for the benefit of the persons interested therein, as may be approved³. The Secretary of State or the Welsh Ministers may entertain an application by the committee without entering into the question as to the appointment or constitution of the committee⁴, it being sufficient that the committee is a de facto committee⁵.

If the Secretary of State sees fit, or the Welsh Ministers see fit, to proceed with the application, he calls (or they call) a meeting accordingly, at which the majority in number and the majority in respect of interest bind the minority and absentees⁶. At the meeting persons interested may vote by proxy⁷.

If at the meeting no instructions are resolved upon, or if the Secretary of State deems, or the Welsh Ministers deem, the instructions unjust or unreasonable, he or they may by order give such instructions for the investment of the compensation money and for the application of the income as he thinks or they think fit; any such order, whether original or approving instructions passed at the meeting, is required to contain provision for the appointment of new trustees from time to time, and has to be deposited and kept in the same way as inclosure awards⁸. Payment to the trustees discharges the committee from all liability, and the trustees, after payment of the expenses incurred by the Secretary of State or the Welsh Ministers in relation to the application and order, have to deal with the balance of the fund as directed by the order⁹.

1 As to the appointment of the committee see PARA 485. As to whether the functions of the committee may be exercised by a commons council see PARA 485 note 2.

2 These powers were originally vested in the Inclosure Commissioners but are now exercisable, in relation to England, by the Secretary of State or, in relation to Wales, by the Welsh Ministers: see PARA 423.

3 Inclosure Act 1852 s 22. The Compulsory Purchase Act 1965 Sch 4 (see PARAS 484-486) and the other provisions of that Act relating to common land have effect subject to the provisions of the Inclosure Act 1852, the Inclosure Act 1854 (see PARA 488) and the Commonable Rights Compensation Act 1882 (see PARA 489 et seq) relating to the application of compensation money: Compulsory Purchase Act 1965 s 21(2)(a).

4 See PARA 485.

5 *Salmon v Edwards* [1910] 1 Ch 552.

6 Inclosure Act 1852 s 22. Where there is any doubt as to the majority in interest, it must generally be calculated from the rateable value of the tenements in respect of which the right of common is exercised, or in

the case of a stinted pasture from the number of stints: see the Inclosure Act 1845 s 22 (ss 21, 22 amended by the Statute Law Revision Act 1891); and the Inclosure Act 1852 s 35.

7 See the Inclosure Act 1845 s 21 (as amended: see note 6); and the Inclosure Act 1852 s 35.

8 Inclosure Act 1852 s 22. As to the deposit and custody of inclosure awards see PARA 422.

9 Inclosure Act 1852 s 22.

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488. Payment into bank and apportionment.

The powers of the committee¹ in connection with the appointment of trustees² were further extended by the Inclosure Act 1854, under which a majority of the committee could apply to the Inclosure Commissioners (now the Secretary of State or the Welsh Ministers)³ to call a meeting of persons interested in the money to determine whether or not it should be apportioned among them under provisions contained in the Act⁴. If the requisite majority in number and interest resolve upon apportionment, the compensation money is to be paid into the Bank of England to the credit of an account to be named by the Secretary of State or the Welsh Ministers, and the committee is thereupon discharged from all liability⁵. The Secretary of State or the Welsh Ministers may then determine and award the compensation money to the persons interested according to their respective interests in the land taken; there is power to hold meetings, call for evidence, employ a surveyor, and so on⁶. At those meetings persons may vote by proxy⁷.

1 As to the appointment of the committee see PARA 485. As to whether the functions of the committee may be exercised by a commons council see PARA 485 note 2.

2 See PARA 487.

3 These powers were originally vested in the Inclosure Commissioners but are now exercisable, in relation to England, by the Secretary of State or, in relation to Wales, by the Welsh Ministers: see PARA 423.

4 Inclosure Act 1854 s 15. As to the application of the provisions of the Inclosure Act 1854 relating to the application of compensation money to the procedure under the Compulsory Purchase Act 1965 Sch 4 (see PARAS 484-486) see PARA 487 note 3.

5 Inclosure Act 1854 s 16.

6 Inclosure Act 1854 s 17.

7 Inclosure Act 1854 s 21; Inclosure Act 1845 s 21 (amended by the Statute Law Revision Act 1891).

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489. Improvement of common, etc, and purchase of additional land.

The Commonable Rights Compensation Act 1882 provides additional modes of dealing with compensation money, and under it the committee¹ or a majority of its number, or after the expiration of 12 months from the payment of the money to the committee any three of the persons claiming to be interested in the money, may apply in writing to the Secretary of State or the Welsh Ministers (formerly the Inclosure Commissioners)² to call a meeting³ of the persons interested⁴ to consider the application of the money, and at such a meeting resolutions may be passed by a majority in number and in value of interests for the application of the money in one or more of the following ways:

- 96 (1) in improving the remainder of the common⁵;
- 97 (2) in defraying the expenses of a scheme under the Metropolitan Commons Acts⁶, or a provisional order for regulation under the Inclosure Acts⁷, or an application to Parliament for a private Bill or otherwise for the preservation and management of the common as an open space⁸;
- 98 (3) in defraying the expenses of any legal proceedings for the protection of the common or the commoners' rights over it⁹;
- 99 (4) in the purchase of additional land to be used as common land¹⁰; and
- 100 (5) in the purchase of additional land to be used as a recreation ground for the neighbourhood¹¹.

The terms of the resolution, which is made binding on the minority and absent parties, are embodied in an order of the Secretary of State or the Welsh Ministers, and the money is to be applied as directed by the order¹².

These provisions do not extend to the New Forest¹³.

1 As to the appointment of the committee see PARA 485. As to whether the functions of the committee may be exercised by a commons council see PARA 485 note 2.

2 Powers under the Commonable Rights Compensation Act 1882 were originally vested in the Inclosure Commissioners but are now exercisable, in relation to England, by the Secretary of State or, in relation to Wales, by the Welsh Ministers: see PARA 423.

3 Provision is made for the advertisement and conduct of the meeting: see the Commonable Rights Compensation Act 1882 s 2(4).

4 As to the meaning of 'persons interested' see *R v Brooker, ex p Hitchin Town Football and Social Club Ltd* (1990) Times, 17 April (the meaning of 'persons interested' in the Commonable Rights Compensation Act 1882 s 2 cannot be drawn from the Inclosure Act 1845 s 16, even though the Commonable Rights Compensation Act 1882 is included in the phrase 'Inclosure Acts 1845 to 1882', because it is not part of the statutory code of the Inclosure Acts).

5 Commonable Rights Compensation Act 1882 s 2(1)(a). As to the application of the provisions of the Commonable Rights Compensation Act 1882 relating to the application of compensation money to the procedure under the Compulsory Purchase Act 1965 Sch 4 (see PARAS 484-486) see PARA 487 note 3.

6 As to the Metropolitan Commons Acts, and schemes under those Acts, see **LONDON GOVERNMENT**.

7 As to the Inclosure Acts see PARA 419 note 2; and as to the regulation of commons under those Acts see PARA 586 et seq.

8 Commonable Rights Compensation Act 1882 s 2(1)(b).

9 Commonable Rights Compensation Act 1882 s 2(1)(c).

10 Commonable Rights Compensation Act 1882 s 2(1)(d); and see PARA 490. As to the registration of such land see PARA 506 et seq.

11 Commonable Rights Compensation Act 1882 s 2(1)(e); and see PARA 490.

12 Commonable Rights Compensation Act 1882 s 2(1). Copies of all orders made by the Secretary of State or the Welsh Ministers are to be deposited and kept as inclosure awards are directed to be kept: see s 5; the Inclosure Act 1845 s 146; and PARA 422.

13 Commonable Rights Compensation Act 1882 s 6.

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490. Purchase of additional common lands.

Where additional common land is purchased with the compensation money¹, it is conveyed to trustees, who are appointed by an order of the Secretary of State or the Welsh Ministers (formerly the Inclosure Commissioners)² which defines their powers and duties, and contains provisions for the appointment of new trustees³, all pursuant to resolutions passed as before at a special meeting⁴. Land purchased for a recreation ground is conveyed to a local authority, as specified in the Commonable Rights Compensation Act 1882, and held and managed in accordance with the provisions relating to recreation grounds contained in the Inclosure Acts⁵.

These provisions do not extend to the New Forest⁶.

1 As to the power to apply the compensation money in the purchase of additional land to be used as common land see PARA 489.

2 Powers under the Commonable Rights Compensation Act 1882 were originally vested in the Inclosure Commissioners but are now exercisable, in relation to England, by the Secretary of State or, in relation to Wales, by the Welsh Ministers: see PARA 423.

3 Every appointment of a new trustee is subject to confirmation by the Secretary of State or the Welsh Ministers: Commonable Rights Compensation Act 1882 s 2(3). For a case where a meeting to appoint new trustees was declared invalid because 'persons interested' in the land were excluded from the meeting see *R v Brooker, ex p Hitchin Town Football and Social Club Ltd* (1990) Times, 17 April.

4 Commonable Rights Compensation Act 1882 s 2(2); and see PARA 489. As to the application of the provisions of the Commonable Rights Compensation Act 1882 relating to the application of compensation money to the procedure under the Compulsory Purchase Act 1965 Sch 4 (see PARAS 484-486) see PARA 487 note 3.

5 Commonable Rights Compensation Act 1882 s 2(5), Schedule (amended by the Local Government Act 1985 Sch 8 para 10(3)). As to the Inclosure Acts see PARA 419 note 2.

6 Commonable Rights Compensation Act 1882 s 6.

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491. Approval of application of compensation money.

Provision is also made for legalising by an order of the Secretary of State or the Welsh Ministers (formerly the Inclosure Commissioners)¹ the previous application of compensation money by a committee² in one or more of the ways authorised by the Commonable Rights Compensation Act 1882, and for discharging the committee from liability in respect of such application. The order is to be made in pursuance of a resolution passed at any meeting of the persons interested called by the Secretary of State or the Welsh Ministers in the manner provided for meetings under that Act³ and by a majority in number and a majority in value of interests⁴.

The New Forest is excluded from the operation of the Commonable Rights Compensation Act 1882⁵.

1 Powers under the Commonable Rights Compensation Act 1882 were originally vested in the Inclosure Commissioners but are now exercisable, in relation to England, by the Secretary of State or, in relation to Wales, by the Welsh Ministers: see PARA 423.

2 As to the appointment of the committee see PARA 485. As to whether the functions of the committee may be exercised by a commons council see PARA 485 note 2.

3 See PARA 489.

4 Commonable Rights Compensation Act 1882 s 4. As to the application of the provisions of the Commonable Rights Compensation Act 1882 relating to the application of compensation money to the procedure under the Compulsory Purchase Act 1965 Sch 4 (see PARAS 484-486) see PARA 487 note 3.

5 Commonable Rights Compensation Act 1882 s 6.

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492. Jurisdiction of High Court.

The committee of commoners¹, or in cases of difficulty the Secretary of State or the Welsh Ministers (formerly the Inclosure Commissioners)², is the proper tribunal to ascertain who are the persons interested in the compensation money, and what their interests are. In the absence of fraud or misconduct on the part of the committee, the court has no original power to interfere³; but in several cases where there was considerable complication, and no objection was raised, the rights of persons entitled to compensation money have been determined by the Chancery Division⁴.

1 As to the appointment of the committee see PARA 485. As to whether the functions of the committee may be exercised by a commons council see PARA 485 note 2.

2 Powers under the Commonable Rights Compensation Act 1882 were originally vested in the Inclosure Commissioners but are now exercisable, in relation to England, by the Secretary of State or, in relation to Wales, by the Welsh Ministers: see PARA 423.

3 *Richards v De Winton*, *Richards v Evans* [1901] 2 Ch 566 (affd [1903] 1 Ch 507, CA); *Salmon v Edwards* [1910] 1 Ch 552.

4 *Nash v Coombs* (1868) LR 6 Eq 51; *Fox v Amhurst* (1875) LR 20 Eq 403; *Austin v Amhurst* (1877) 7 ChD 689; *A-G v Meyrick* [1893] AC 1, HL; *Weatherley v Layton* [1892] WN 165; *Ex p Lincoln Corpn* (1852) 6 Ry & Can Cas 738. See also *Evans v Merthyr Tydfil UDC* [1899] 1 Ch 241, CA.

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(5) EXTINGUISHMENT AND SUSPENSION OF RIGHTS OF COMMON

(i) Surrender, Exhaustion and Suspension

493. Effect of surrender or extinguishment on registration.

Where any land¹ registered under the Commons Registration Act 1965² has ceased to be common land³, or any right of common⁴ registered under that Act has been extinguished or released, the register may be amended accordingly⁵.

The Commons Act 2006 provides that, except as provided under Part 1 of that Act⁶ or by any other enactment, no right of common registered in a register of common land or town or village greens⁷ is to be removed from that register⁸. The surrender to any extent of a right of common⁹ which is registered in a register of common land or town or village greens only has effect if it complies with such requirements as to form and content as regulations¹⁰ may provide¹¹ and it does not operate at law until, on an application under the relevant provision of the 2006 Act¹², the right is removed from the register¹³. Furthermore, a right of common which is registered in a register of common land or town or village greens cannot be extinguished by operation of common law¹⁴. At the date at which this volume states the law, however, these provisions were fully in force only in relation to the pilot areas in England¹⁵.

1 As to the meaning of 'land' for registration purposes see PARA 403 note 1.

2 As to registration see PARA 506 et seq.

3 As to the meaning of 'common land' for registration purposes see PARA 407.

4 As to the meaning of 'right of common' for registration purposes see PARA 405.

5 See the Commons Registration Act 1965 s 13(c) (amended by the Law of Property Act 1969 Sch 2 Pt I; repealed in relation to the pilot areas in England by virtue of SI 2008/1960; prospectively repealed, in relation to the whole of England and Wales, by the Commons Act 2006 Sch 6 Pt 1, as from a day to be appointed under s 56(1); at the date at which this volume states the law, no such day had been appointed); the Commons Registration (General) Regulations 1966, SI 1966/1471, regs 27, 29 (both amended by SI 1968/658). See, however, PARA 516 note 2. As to the pilot areas in England see PARA 467 text and notes 29-30; and for transitional provisions applying in relation to the pilot areas see the Commons Act 2006 (Commencement No 4 and Savings) (England) Order 2008, SI 2008/1960, art 3(2), (3).

6 Ie except as provided under the Commons Act 2006 Pt 1 (ss 1-25) (not fully in force). See further s 13; and the text and notes 7-14. There is provision for land to be removed from the registers in s 16 (deregistration and exchange: see PARAS 545, 547) and Sch 2 (non-registration or mistaken registration of land under the Commons Registration Act 1965: see PARA 535 et seq), and for corrections to the registers under s 19 which may in certain circumstances result in land being removed from the registers (see PARA 534). There is also power to make provision for land to be removed from the registers in consequence of certain statutory dispositions by means of regulations under s 14: see PARA 544.

7 As to the meanings of 'register of common land' and 'register of town or village greens' see PARA 424 notes 7, 12; as to registration of common land and rights of common see PARA 506 et seq; and as to land which may be registered in England and Wales as a town or village green under the Commons Act 2006 see s 15; and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 541.

8 Commons Act 2006 s 3(6) (not fully in force).

9 The reference in the Commons Act 2006 s 13(1) to a surrender of a right of common does not include a disposition having the effect referred to in s 7(1)(a) (variation of right: see PARA 522): s 13(2) (not fully in force).

10 As to the meaning of 'regulations' see PARA 602 note 7.

11 Commons Act 2006 s 13(1)(a) (not fully in force).

12 le under the Commons Act 2006 s 13 (not fully in force). In relation to the pilot areas in England, an application under s 13 may only be made by: (1) the owner of the land to which the right of common is attached or, in the case of a right of common in gross, the owner of that right; or (2) the owner of the land or of any part of the land over which the right of common is exercisable: Commons Registration (England) Regulations 2008, SI 2008/1961, Sch 4 para 7(1). Where the applicant is the owner of the land (or of any part of the land) over which the right of common is exercisable, the application must show that the owner of the land to which that right is attached or, as the case may be, the owner of the right of common in gross, consents to the application: Sch 4 para 7(2). The application must include (a) evidence of the applicant's capacity to make the application by virtue of Sch 4 para 7(1)(a) or (b) (see heads (1), (2) above); (b) the numbers of the register unit and the rights section entry in the register of common land or town or village greens for the right of common to which the application relates; and (c) except where the right of common is held in gross, a description of the land to which the right of common is attached: Sch 4 para 7(3). Where it relates to only part of a right of common which is attached to land, the application must identify that part of the land to which it is attached and must be accompanied by an application made for the purposes of the Commons Act 2006 s 8 (see PARA 522): Commons Registration (England) Regulations 2008, SI 2008/1961, Sch 4 para 7(4). In addition to the persons and bodies listed in Sch 6 para 1 (see PARA 550 note 24), the application must be served on the following persons (other than the applicant): (i) the owner of the land to which the right of common is or was attached, or the owner of the right of common in gross (as the case may be); (ii) the owner of the land over which the right of common is or was exercisable: Sch 6 para 2, Table. As to the meaning of 'right of common in gross' see PARA 468 note 3. As to the pilot areas in England see PARA 467 text and notes 29-30; as to registration applications in relation to those areas see generally Pt 3 (regs 15-38); and PARAS 540, 549 et seq; as to the fee to accompany the application see PARA 549 note 11; as to the service of documents see PARA 532 note 17; and as to land descriptions see reg 19; and PARA 468 note 7.

13 Commons Act 2006 s 13(1)(b) (not fully in force). Subject to any provision made by or under Pt 1 (ss 1-25) (not fully in force), an application made for the purposes of s 13 must be granted: see s 24(4).

14 Commons Act 2006 s 13(3) (not fully in force).

15 See the Commons Act 2006 (Commencement No 4 and Savings) (England) Order 2008, SI 2008/1960, art 2(1)(a), (b); Commons Act 2006 (Commencement No 1, Transitional Provisions and Savings) (Wales) Order 2007, SI 2007/2386, art 2.

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494. Exhaustion or suspension of right.

At common law, exhaustion of the product which is the subject matter of a right of common will necessarily put an end to the right; for instance if houses are built on the land over which the right was exercisable, or the land is converted to such uses that no grass can possibly grow there, a right of common of pasture will be extinguished¹. On commons by the seashore encroachments of the sea may destroy rights of common by covering pasture land with shingle²; and common of turbary³ may be extinguished by the complete digging out of the peat bed⁴ or by the draining of a marsh so that peats can no longer be obtained⁵. As some rights of common can only be exercised on such parts of the land as produce the particular product, the right will be held to be extinguished or not to have existed if the land is incapable of producing it⁶. Where after an interval the product will reappear, or where there is no reason to suppose that the land is permanently incapable of producing it, the right will be suspended and not extinguished⁷.

However, the Commons Act 2006 provides that a right of common⁸ which is registered in a register of common land or town or village greens⁹ cannot be extinguished by operation of common law¹⁰ and can only be removed from the registers as provided by statute¹¹. At the date at which this volume states the law, these provisions were in force only in relation to the pilot areas in England¹².

1 See *Carr v Lambert* (1866) LR 1 Exch 168.

2 See *Scrutton v Stone* (1893) 9 TLR 478.

3 As to common of turbary see PARAS 457-458.

4 *Clarkson v Woodhouse* (1782) 5 Term Rep 412n (where a custom for commoners having rights of turbary in a moss to hold certain moss dales in severalty when cleared of the turves was held good).

5 *Dean and Chapter of Ely v Warren* (1741) 2 Atk 189.

6 See *Peardon v Underhill* (1850) 16 QB 120; *Morewood v Wood* (1791) 14 East 327; *Maxwell v Martin* (1830) 6 Bing 522.

7 See *Robertson v Hartopp* (1889) 43 ChD 484, CA (where turves were cut on the waste, and the evidence showed that the land took from two to six years to recover).

8 As to the meaning of 'right of common' for registration purposes see PARA 405.

9 As to the meanings of 'register of common land' and 'register of town or village greens' see PARA 424 notes 7, 12; as to registration of common land and rights of common see PARA 506 et seq; and as to land which may be registered in England and Wales as a town or village green under the Commons Act 2006 see s 15; and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 541.

10 See the Commons Act 2006 s 13(3) (not fully in force); and PARA 493.

11 See the Commons Act 2006 s 3(6) (not fully in force); and PARAS 493, 527.

12 See the Commons Act 2006 (Commencement No 4 and Savings) (England) Order 2008, SI 2008/1960, art 2(1)(a), (b). As to the pilot areas in England see PARA 467 text and notes 29-30.

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(ii) Unity of Estate or Possession

495. Unity of ownership.

At common law, when the ownership of the whole of the land which gives the right of common and that of the land which is the subject of the right unite by purchase in the same person the right of common becomes extinguished, whether the right be appendant or appurtenant¹. It has been held that the estates in fee simple must be equal in duration, quality, and all other circumstances of right². If there is unity of possession only but not unity of estate, as where a person, having a right of common, takes a lease for years of the land over which the right is exercised, the right is suspended and revives upon the expiration of the lease³.

However, the Commons Act 2006 provides that a right of common⁴ which is registered in a register of common land or town or village greens⁵ cannot be extinguished by operation of common law⁶ and can only be removed from the registers as provided by statute⁷. At the date at which this volume states the law, this provision was in force only in relation to the pilot areas in England⁸. The effect of this provision is that rights acquired by the owner of the common will be exercisable by that person in the same way as the rights were exercisable by their former owner⁹.

1 *Tyrringham's Case* (1584) 4 Co Rep 36b at fo 38a; Tudor, LC Real Prop (4th Edn) 700. See also *Nelson's Case* (1585) Gouldsb 3; *Sawyer's Case* (1632) W Jo 284; cf *Musgrave v Inclosure Comrs* (1874) LR 9 QB 162 at 174 per Blackburn J. As to the possible difficulty of amending the registers under the Commons Registration Act 1965 s 13 see PARA 516 note 2. As to the distinction between rights of common appendant and appurtenant see PARA 433 note 4; as to appendant rights see PARAS 433-438; and as to appurtenant rights see PARAS 439-445.

In practice many freeholders of common land who also owned adjacent farms registered rights under the Commons Registration Act 1965 to protect their position and that of their agricultural tenants. The legal status of such registrations has been doubted in view of the law as stated in the text and the fact that a person cannot have a right over his or her own land; however the conclusive effect of registration under s 10 (see PARA 508) may have had the effect of creating a statutory right. This can become of practical importance in cases of insufficiency: see PARA 557. Similar considerations apply where the agricultural tenants of an estate themselves registered rights over the waste.

2 *R v Hermitage Inhabitants* (1692) Carth 239. Cf *Warburton v Parke* (1857) 2 H & N 64.

3 Co Litt 114b; *Wyat Wild's Case* (1609) 8 Co Rep 78b.

4 As to the meaning of 'right of common' for registration purposes see PARA 405.

5 As to the meanings of 'register of common land' and 'register of town or village greens' see PARA 424 notes 7, 12; as to registration of common land and rights of common see PARA 506 et seq; and as to land which may be registered in England and Wales as a town or village green under the Commons Act 2006 see s 15; and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 541.

6 See the Commons Act 2006 s 13(3) (not fully in force); and PARA 493.

7 See the Commons Act 2006 s 3(6) (not fully in force); and PARAS 493, 527.

8 See the Commons Act 2006 (Commencement No 4 and Savings) (England) Order 2008, SI 2008/1960, art 2(1)(a), (b). As to the pilot areas in England see PARA 467 text and notes 29-30.

9 See the Explanatory Notes to the Commons Act 2006 para 83.

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496. Purchase of part of land having right of common or of part of the common.

The purchase by the commoner of part of the land to which a right of common is appendant or appurtenant¹ does not effect an extinguishment at common law of the right of common over the whole, for the right is apportioned². Common appendant, being of common right, is apportioned on the purchase by the commoner of any part of the land in which he has common³. On the other hand, common appurtenant (except shack⁴) to a house or to land was formerly extinguished by the purchase by the commoner of any portion of the land over which the rights were exercisable and was suspended by a lease⁵. The same rule applied to common in gross⁶ and any other kind of common⁷.

However, the Commons Act 2006 provides that a right of common⁸ which is registered in a register of common land or town or village greens⁹ cannot be extinguished by operation of common law¹⁰ and can only be removed from the registers as provided by statute¹¹. At the date at which this volume states the law, this provision was in force only in relation to the pilot areas in England¹². The effect of this provision is that rights acquired by the owner of the common will be exercisable by that person in the same way as the rights were exercisable by their former owner¹³.

1 As to the distinction between rights of common appendant and appurtenant see PARA 433 note 4. As to appendant rights see PARAS 433-438; and as to appurtenant rights see PARAS 439-445.

2 Co Litt 122a; *Tyrringham's Case* (1584) 4 Co Rep 36b at fo 37b; Com Dig, Common, L; Tudor, LC Real Prop (4th Edn) 700; *White v Taylor (No 2)* [1969] 1 Ch 160, [1968] 1 All ER 1015; and see PARA 445.

3 Com Dig, Common, L; and see *Wyat Wild's Case* (1609) 8 Co Rep 78b. See also PARA 434.

4 As to common of shack, or mutual commoning, see PARA 416. From a case quoted in Rolle's Abridgment it would appear that common of shack is not extinguished at common law by unity of possession, but it is doubtful whether more than common of vicinage (see further PARAS 448-451) is intended, and to this common of shack was supposed to be closely allied: 1 Roll Abr 935.

5 *Wyat Wild's Case* (1609) 8 Co Rep 78b; *Tyrringham's Case* (1584) 4 Co Rep 36b; *Bradshaw v Eyre* (1597) Cro Eliz 570; and see *Morse and Webb's Case* (1610) 13 Co Rep 65; *Smith v Bensall* (1597) Gouldsb 117; *White v Taylor* [1969] 1 Ch 150, [1967] 3 All ER 349. As to the general prohibition on severance of a right of common attached to land, and the exceptions to that prohibition, see PARA 498 et seq.

6 As to rights of common in gross see PARAS 446-447.

7 *Sawyer's Case* (1632) W Jo 284; Vin Abr, Common, Ea, 24. See also PARA 433.

8 As to the meaning of 'right of common' for registration purposes see PARA 405.

9 As to the meanings of 'register of common land' and 'register of town or village greens' see PARA 424 notes 7, 12; as to registration of common land and rights of common see PARA 506 et seq; and as to land which may be registered in England and Wales as a town or village green under the Commons Act 2006 see s 15; and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 541.

10 See the Commons Act 2006 s 13(3) (not fully in force); and PARA 493.

11 See the Commons Act 2006 s 3(6) (not fully in force); and PARAS 493, 527.

12 See the Commons Act 2006 (Commencement No 4 and Savings) (England) Order 2008, SI 2008/1960, art 2(1)(a), (b). As to the pilot areas in England see PARA 467 text and notes 29-30.

13 See the Explanatory Notes to the Commons Act 2006 para 83.

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(iii) Severance

497. Rights formerly capable of severance.

Whether a right of common is extinguished by severance from the land or tenement to which it is appendant or appurtenant¹ used to depend upon the way in which it could be measured after alienation. Common appendant, which was always measured by the capacity and requirements of the land or tenement to which it was appendant (as in the case of common of pasture by levancy and couchancy²), could not be severed. This remains the position where the commons of turbary³, estovers⁴, piscary⁵, and so on, which are measured by the requirements of the house or farm, can be appendant⁶. The same rule applies to common appurtenant where the measure of the right is the same⁷. On registration under the Commons Registration Act 1965⁸, however, the number of animals in respect of which a common of pasture was exercisable had to be quantified⁹, and it thus became possible for the right to be excepted on a conveyance or demise of the land or to be granted separately¹⁰, in which case it ceased to be common appurtenant and became a common in gross¹¹. The same might apply to a right to take a certain number of cartloads of wood, turf, or peat or a certain number of fish¹².

Severance of grazing rights meant that many livestock farmers were able to buy rights in order to pasture numerous animals, leading to management difficulties for common land where some right holders had no close contact with the common and those who managed it¹³. The Commons Act 2006 now prohibits further severance, subject to certain limited exceptions¹⁴.

1 As to the distinction between rights of common appendant and appurtenant see PARA 433 note 4. As to appendant rights see PARAS 433-438; and as to appurtenant rights see PARAS 439-445.

2 Levancy and couchancy has, in effect, been abolished by the Commons Registration Act 1965 s 15, under which claims to grazing rights were to be quantified: see PARA 435.

3 As to common of turbary see PARAS 457-458.

4 As to common of estovers see PARAS 459-460.

5 As to common of piscary see PARAS 461-464.

6 At common law, an exception of the rights of common from a conveyance of the land or tenement or a conveyance of the rights of common separately from the land or tenement extinguishes the right: YB 26 Hen 8, Trin p 4, c 15; 1 Roll Abr 396; Vin Abr, Common, O. However, the Commons Act 2006 provides that a right of common which is registered in a register of common land or town or village greens cannot be extinguished by operation of common law and can only be removed from the registers as provided by statute: see s 13(3) (not fully in force). At the date at which this volume states the law, this provision was in force only in relation to the pilot areas in England: see the Commons Act 2006 (Commencement No 4 and Savings) (England) Order 2008, SI 2008/1960, art 2(1)(a), (b). Furthermore, as commons of turbary, estovers and piscary are normally attached to a house, they cannot, except as provided by the Commons Act 2006 s 9(2), now be severed from that house (see PARA 498); but if the house is divided, for example by being sold off in flats, the rights would be apportioned under s 9(5) (see PARA 498).

As to the pilot areas in England see PARA 467 text and notes 29-30. As to the meaning of 'right of common' for registration purposes see PARA 405. As to the meanings of 'register of common land' and 'register of town or village greens' see PARA 424 notes 7, 12; as to registration of common land and rights of common see PARA 506 et seq; and as to land which may be registered in England and Wales as a town or village green under the Commons Act 2006 see s 15; and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 541.

7 *Drury v Kent* (1603) Cro Jac 14; cf *Bunn v Channen* (1813) 5 Taunt 244; *Daniel v Hanslip* (1672) 2 Lev 67; *Lathbury v Arnold* (1823) 1 Bing 217. All claims to grazing rights must now be quantified (see note 2), so once a registration has become final, the number of beasts which may be grazed will become fixed. See also PARA 433 note 6.

8 As to the requirement of registration see PARA 403; and as to registration see PARA 506 et seq.

9 See the Commons Registration Act 1965 s 15; *Bettison v Langton*[2001] UKHL 24, [2002] 1 AC 27, [2001] 3 All ER 417; and PARA 435.

10 *Drury v Kent* (1603) Cro Jac 14; YB 26 Hen 8, Trin p 4, c 15.

11 See *Bettison v Langton*[2001] UKHL 24, [2002] 1 AC 27, [2001] 3 All ER 417 (appurtenant grazing rights might be severed from land to become profits in gross). As to rights of common in gross see PARAS 446-447.

12 Quaere whether estovers for a fixed quantity could be severed. See, in support of the proposition that a right to a quantity certain of estovers would be good in gross, and therefore severable from the premises to which it is appurtenant, *Clayton v Corby* (1843) 5 QB 415; *Hayward v Cunnington* (1668) 2 Keb 290 at 311 (where a prescription for so many turves as two men could dig in 14 days as belonging to a messuage, but without an allegation that they were to be spent on the messuage, failed; but there was a distinct expression of opinion that if it had been alleged as a claim in gross it would have succeeded). See also Cooke's Inclosure Acts (4th Edn) 37; Elton on Commons 87. The opposite view is taken in Gadsden *The Law of Commons* (1988) pp 186-188, citing in support *Sir Henry Nevil's Case* (1570) Plowd 377 at 381; *A-G v Reynolds* [1911] 2 KB 888 at 903 et seq. See also the Explanatory Notes to the Commons Act 2006 para 64.

13 See 673 HL Official Report (5th series), 20 July 2005, col 1488; and the Explanatory Notes to the Commons Act 2006 para 63.

14 See the Commons Act 2006 s 9, Sch 1; and PARAS 498-501.

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498. General prohibition of severance.

A right of common¹ which:

- 101 (1) is registered in a register of common land or town or village greens² as attached to any land³; and
- 102 (2) would otherwise be capable of being severed from that land⁴,

is not at any time on or after 28 June 2005⁵ capable of being severed from the land to which it is attached, except:

- 103 (a) where the severance is authorised by or under Schedule 1 to the Commons Act 2006⁶; or
- 104 (b) where the severance is authorised by or under any other Act⁷.

Where any instrument made on or after 28 June 2005 would effect a disposition in relation to such a right of common in contravention of the above prohibition⁸, the instrument is void to the extent that it would effect such a disposition⁹.

Where by virtue of any instrument made on or after 28 June 2005:

- 105 (i) a disposition takes effect in relation to land to which such a right of common is attached, and the disposition would have the effect of contravening the above prohibition¹⁰, the disposition also has effect in relation to the right notwithstanding anything in the instrument to the contrary¹¹;
- 106 (ii) such a right of common falls to be apportioned between different parts of the land to which it is attached, the instrument is void to the extent that it purports to apportion the right otherwise than rateably¹².

Nothing in the above provisions, however, affects any instrument made before, or made pursuant to a contract made in writing before, 28 June 2005¹³.

1 As to the meaning of 'right of common' see PARA 405.

2 As to the meanings of 'register of common land' and 'register of town or village greens' see PARA 424 notes 7, 12; as to registration see PARA 506 et seq; and as to land which may be registered in England and Wales as a town or village green under the Commons Act 2006 see s 15; and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 541. In relation to any area of England and Wales, the reference in s 9(1) to a register of common land or town or village greens (see head (1) in the text) is, however, during the relevant period in relation to that area, to be read as a reference to such a register kept under the Commons Registration Act 1965: Commons Act 2006 s 57(1). The 'relevant period', in relation to an area of England and Wales, is the period which begins with 28 June 2005 and ends with the coming into force of s 1 in relation to that area: s 57(3), (4). At the date at which this volume states the law, s 1 was in force only in relation to the pilot areas in England: see the Commons Act 2006 (Commencement No 4 and Savings) (England) Order 2008, SI 2008/1960, art 2(1)(a). As to the pilot areas see PARA 467 text and notes 29-30.

3 See the Commons Act 2006 s 9(1)(a). As to the meaning of 'land' see PARA 403 note 1.

4 See the Commons Act 2006 s 9(1)(b). As to rights otherwise capable of severance see PARA 497.

5 le the date when the Commons Act 2006 s 9 and Sch 1 are deemed to have come into force: see s 9(7). The purpose of s 9(7) is to prevent commoners from severing rights of common after the date of introduction of the Commons Bill but before the Bill received Royal Assent on 19 July 2006: see 673 HL Official Report (5th series), 20 July 2005, col 1488.

6 As to severance authorised by or under the Commons Act 1006 Sch 1 (paras 1-3) see *PARAS* 499-501.

7 Commons Act 2006 s 9(1), (2). The only other enactment known to permit severance in certain circumstances is contained in the Greenham and Crookham Commons Act 2002 s 33 (amended by the Commons Act 2006 Sch 6 Pt 1). That Act, being local in nature, falls outside the scope of this work.

8 le in contravention of the Commons Act 2006 s 9(2): see the text and notes 5-7.

9 Commons Act 2006 s 9(3).

10 le contravening the Commons Act 2006 s 9(2): see the text and notes 5-7.

11 Commons Act 2006 s 9(4).

12 Commons Act 2006 s 9(5).

13 Commons Act 2006 s 9(6).

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499. Authorised severance by transfer to public bodies.

A right of common¹ to which the general prohibition on severance applies² may on or after 28 June 2005³ be severed permanently from the land⁴ to which it is attached by being transferred on its own to:

- 107 (1) any commons council⁵ established for the land over which the right is exercisable;
- 108 (2) Natural England⁶ (where the land or any part of it is in England); or
- 109 (3) the Countryside Council for Wales⁷ (where the land or any part of it is in Wales)⁸.

Where a person proposes to sever such a right of common by a transfer under head (2) or head (3) above, Natural England or the Countryside Council for Wales as the case may be must:

- 110 (a) give notice of the proposal to the owner of the land over which the right is exercisable unless his name and address cannot reasonably be ascertained;
- 111 (b) in a case where there is no commons council established for the land, give notice of the proposal to such persons (if any) as they consider represent the interests of persons exercising rights of common over the land⁹.

Such a notice must be given at least two months before the transfer and must:

- 112 (i) specify the name and address of the owner of the land¹⁰ to which the right is attached;
- 113 (ii) describe the right proposed to be transferred, giving such details as regulations¹¹ may specify;
- 114 (iii) state the proposed consideration for the transfer; and
- 115 (iv) give such other information as regulations may specify¹².

Where a right of common to which the general prohibition on severance applies¹³ is exercisable over land for which a commons council is established, the right may only be severed by a transfer under head (2) or head (3) above if that council consents to the transfer¹⁴. In a case where there is no commons council established for the land over which such a right of common is exercisable, the appropriate national authority¹⁵ may by order provide that a person with functions of management conferred by any enactment in relation to that land is to be regarded, for any or all purposes of these provisions, as a commons council established for the land¹⁶.

The severance of a right of common by its transfer under heads (1) to (3) above:

- 116 (A) only has effect if the transfer complies with such requirements as to form and content as regulations may provide¹⁷; and
- 117 (B) does not operate at law until, on an application¹⁸, the transferee is registered as the owner of the right in the register of common land or of town or village greens¹⁹ in which the right is registered²⁰.

Heads (A) and (B) above do not, however, have effect in relation to a right of common severed in accordance with the above provisions from land in any area of England and Wales during the relevant period²¹ in relation to that area²².

1 As to the meaning of 'right of common' see PARA 405.

2 Ie a right of common to which the Commons Act 2006 s 9 applies: see PARA 498.

3 Ie the date on which the Commons Act 2006 Sch 1 came into force: see PARA 498 note 5.

4 As to the meaning of 'land' see PARA 403 note 1.

5 As to the meaning of 'commons council' see PARA 602 note 1. For all purposes of the Commons Act 2006 Sch 1 para 1 (severance by transfer to public bodies), the Dartmoor Commoners' Council is to be regarded as a commons council established for the commons: Dartmoor Commons (Authorised Severance) Order 2008, SI 2008/1962, art 2.

6 As to Natural England see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 523. Between 28 June 2005 and 1 October 2006, the reference in the text to Natural England was to be read as a reference to the former body known as English Nature (whose functions were transferred to Natural England by the Natural Environment and Rural Communities Act 2006 s 1): see the Commons Act 2006 s 58.

7 As to the Countryside Council for Wales see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 524.

8 Commons Act 2006 Sch 1 para 1(1).

9 Commons Act 2006 Sch 1 para 1(2).

10 As to the meaning of 'owner of the land' see PARA 430 note 5.

11 As to the meaning of 'regulations' see PARA 602 note 7.

12 Commons Act 2006 Sch 1 para 1(3). In relation to the pilot areas in England, a notice under Sch 1 para 1(2) of a proposal to sever a right of common from the land to which it is attached by transferring it on its own to Natural England must, in addition to the matters set out in Sch 1 para 1(3): (1) contain an extract of the relevant entry in the rights section of the register unit relating to the registration of the right of common, which must include the information specified in the Commons Registration (England) Regulations 2008, SI 2008/1961, reg 46(2) (see heads (a)-(e) below); (2) state whether, and if so to what extent, the right of common has been exercised during the period of five years prior to the giving of the notice; and (3) specify the earliest date on which the application by Natural England under the Commons Act 2006 Sch 1 para 1(6)(b) (see head (B) in the text) is intended to be made: Commons Registration (England) Regulations 2008, SI 2008/1961, reg 46(1). The extract from the register required by reg 46(1)(a) (see head (1) above) must include (a) a description of the right of common; (b) the rights section entry number of the register entry for the right of common; (c) a description of the land to which the right of common is attached; (d) the register unit number of the land over which the right of common is exercisable; and (e) where the right of common is exercisable over part only of that register unit, a description of that part of the register unit over which the right is exercisable: reg 46(2). As to register units see reg 6; and PARA 549; as to the pilot areas in England see PARA 467 text and notes 29-30; and as to land descriptions see reg 19; and PARA 468 note 7.

13 See note 2.

14 Commons Act 2006 Sch 1 para 1(4).

15 As to the meaning of 'appropriate national authority' see PARA 411 note 1.

16 Commons Act 2006 Sch 1 para 1(5).

17 Commons Act 2006 Sch 1 para 1(6)(a).

18 Ie an application under the Commons Act 2006 Sch 1. In relation to the pilot areas in England, an application made under Sch 1 para 1(6)(b) (see head (B) in the text), for the purpose of registering a transferee as the owner of a right of common upon the severance of that right, may only be made by (1) the body (being a body specified in Sch 1 para 1(1)(a)-(c): see heads (1)-(3) in the text) to which the right of common to be severed is to be transferred; or (2) any person who, by virtue of an order under Sch 1 para 1(5) (see the text and notes 15-16), is to be regarded as a commons council for the purpose of Sch 1 para 1(1)(a), and to whom the right of common to be severed is to be transferred: Commons Registration (England) Regulations 2008, SI

2008/1961, Sch 4 para 12(1). The application must show that the owner of the land to which the right of common is attached consents to the application: Sch 4 para 12(2). The application must include (a) the numbers of the register unit and the rights section entry in the register of common land or town or village greens for the right of common to which the application relates; (b) a description of the land to which the right of common is attached and from which it is to be severed, and evidence of the ownership of that land; (c) in a case to which the Commons Act 2006 Sch 1 para 1(2) (see the text and note 9) applies, evidence that notice has been given in accordance with the requirements of (i) the Commons Registration (England) Regulations 2008, SI 2008/1961, reg 46 (see note 12); and (ii) the Commons Act 2006 Sch 1 para 1(2), (3) (see the text and notes 9-12); and (d) in a case to which Sch 1 para 1(4) (see the text and notes 13-14) applies, evidence that the commons council (or the person who, by virtue of an order under Sch 1 para 1(5) (see the text and notes 15-16), is to be regarded as a commons council for the purpose of Sch 1 para 1(4)) for the land in question consents to the transfer: Commons Registration (England) Regulations 2008, SI 2008/1961, Sch 4 para 12(3). Where it relates to only part of a right of common, the application must identify that part of the land to which it is attached and must be accompanied by an application made for the purposes of the Commons Act 2006 s 8 (apportionment: see PARA 522): Commons Registration (England) Regulations 2008, SI 2008/1961, Sch 4 para 12(4); and see PARA 522 note 21. In addition to the persons and bodies listed in Sch 6 para 1 (see PARA 550 note 24), the application must be served on the owner of the land over which the right of common is exercisable (other than the applicant): Sch 6 para 2, Table. As to the pilot areas in England see PARA 467 text and notes 29-30; as to applications in relation to those areas see generally Pt 3 (regs 15-38); and PARAS 540, 549 et seq; as to the fee to accompany the application see PARA 549 note 11; as to the service of documents see PARA 532 note 17; and as to land descriptions see reg 19; and PARA 468 note 7.

19 As to the meanings of 'register of common land' and 'register of town or village greens' see PARA 424 notes 7, 12; as to registration see PARA 506 et seq; and as to land which may be registered in England and Wales as a town or village green under the Commons Act 2006 see s 15; and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 541.

20 Commons Act 2006 Sch 1 para 1(6)(b). Subject to any provision made by or under Pt 1 (ss 1-25) (not fully in force), an application made for the purposes of Sch 1 para 1 must be granted: see s 24(4).

21 As to the meaning of 'the relevant period' see PARA 498 note 2.

22 Commons Act 2006 s 57(2).

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500. Authorised temporary severance by letting or leasing.

A right of common¹ to which the general prohibition on severance applies² may, on or after 28 June 2005³, to any extent be severed temporarily from the land⁴ to which it is attached by virtue of the right, or all or part of the land, being leased or licensed on its own in accordance with:

- 118 (1) provision made by order⁵ by the appropriate national authority⁶; or
- 119 (2) rules made⁷ in relation to the land by a commons council⁸.

Provision under head (1) above and rules referred to in head (2) above may be framed by reference to particular land or descriptions of land and by descriptions of persons to whom rights of common may be leased or licensed⁹.

Where provision under head (1) above applies in relation to any land, and rules referred to in head (2) above also apply in relation to that land and are inconsistent with that provision, the rules prevail over that provision, to the extent of the inconsistency, in relation to that land¹⁰.

The appropriate national authority may by order provide that the leasing or licensing of a right of common, whether authorised by provision under head (1) above or by rules referred to in head (2) above, must comply with such requirements as to form and content as the order may provide¹¹.

In relation to the whole of England, the Secretary of State¹² has exercised his power under head (1) above to make an order providing that a right of common to graze animals¹³ to which the general prohibition on severance applies¹⁴ may be temporarily severed from the land to which it is attached:

- 120 (a) by leasing or licensing the right of common on its own, provided that the period of the lease or licence does not exceed two years; or
- 121 (b) by leasing or licensing the land, or part of the land, to which the right of common is attached, without the right of common¹⁵.

Where a right of common is temporarily severed from any land pursuant to head (b) above, any disposal of the retained right of common on or after the grant of the lease or licence of the land and before its termination is of no effect unless the disposal is made to the grantee of the lease or licence of the land and it is made for a period expiring not more than two years from the expiry of the lease or licence of the land¹⁶. The National Assembly for Wales¹⁷ has made a similar order in relation to Wales, except that the permitted period of severance is not to exceed three, rather than two, years¹⁸.

1 As to the meaning of 'right of common' see PARA 405.

2 I.e a right of common to which the Commons Act 2006 s 9 applies: see PARA 498.

3 I.e the date on which the Commons Act 2006 Sch 1 came into force: see PARA 498 note 5.

4 As to the meaning of 'land' see PARA 403 note 1.

- 5 As to the making of orders see generally the Commons Act 2006 s 59. An order under Sch 1 para 2 might have effect from 28 June 2005: see the Commons Act 2006 s 9(7).
- 6 As to the meaning of 'appropriate national authority' see PARA 411 note 1.
- 7 le under the Commons Act 2006 s 31: see PARA 604.
- 8 Commons Act 2006 Sch 1 para 2(1). As to the meaning of 'commons council' see PARA 602 note 1.
- 9 Commons Act 2006 Sch 1 para 2(2).
- 10 Commons Act 2006 Sch 1 para 2(3).
- 11 Commons Act 2006 Sch 1 para 2(4).
- 12 As to the Secretary of State see PARA 423.
- 13 For these purposes, references to a right of common, in relation to a right of common to graze more than one animal, include a right to graze a proportion of the number of animals that may be grazed by virtue of that right of common: Commons (Severance of Rights) (England) Order 2006, SI 2006/2145, art 2(3).
- 14 See note 2.
- 15 Commons (Severance of Rights) (England) Order 2006, SI 2006/2145, arts 1(2), 2(1). The 2006 Order came into force on 9 September 2006 but has effect as from 28 June 2005: art 1(1).
- 16 Commons (Severance of Rights) (England) Order 2006, SI 2006/2145, art 2(2).
- 17 As to the National Assembly for Wales see PARA 423. Functions under the Commons Act 2006 in relation to Wales are now exercised by the Welsh Ministers: see PARA 423.
- 18 See the Commons (Severance of Rights) (Wales) Order 2007, SI 2007/583.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/2. RIGHTS OF COMMON AND RELATED RIGHTS/(5) EXTINGUISHMENT AND SUSPENSION OF RIGHTS OF COMMON/(iii) Severance/501. Power to authorise permanent severance by order.

501. Power to authorise permanent severance by order.

The appropriate national authority¹ may by order² make provision authorising rights of common³ to which the general prohibition on severance applies⁴ to be severed permanently from the land⁵ to which they are attached by transfer in accordance with that provision⁶. Such provision is to be framed by reference to particular land over which the rights of common are exercisable, or particular descriptions of such land, and may authorise transfers to particular persons, particular descriptions of persons or any person⁷.

The appropriate national authority must, before making any such provision in relation to any land, consult such persons, if any, as it considers represent the interests of persons who own the land and persons who exercise rights of common over the land⁸.

Provision so made may include provision securing that the owner of any land⁹ over which a right of common is exercisable is to be notified, and his consent obtained, before the right may be transferred¹⁰; and that provision may include:

122 (1) provision as to the circumstances in which notification may be regarded as having been given¹¹; or

123 (2) provision as to the circumstances in which consent may be regarded as having been obtained¹², which may include:

7

8. (a) provision for consent to be regarded as having been obtained if it is withheld unreasonably;

9. (b) provision for the circumstances in which consent is to be regarded as withheld unreasonably;

10. (c) provision for the resolution of disputes¹³.

8

The severance of a right of common by its transfer under provision made by an order as described above¹⁴:

124 (i) only has effect if the transfer complies with such requirements as to form and content as regulations¹⁵ may provide; and

125 (ii) does not operate at law until, on an application¹⁶, the transferee is registered as the owner of the right in the register of common land or of town or village greens¹⁷ in which the right is registered¹⁸.

Provision made by such an order¹⁹ may include provision to secure the result that where:

126 (A) the person to whom the right of common is transferred is the owner of land to which rights of common are attached; and

127 (B) those rights are exercisable over the same land, or substantially the same land, as the right of common being transferred,

the transferee must, when making an application as specified in head (ii) above, apply to the commons registration authority for the right to be registered as attached to the land referred to in head (A) above²⁰.

- 1 As to the meaning of 'appropriate national authority' see PARA 411 note 1.
- 2 As to the making of orders see generally the Commons Act 2006 s 59.
- 3 As to the meaning of 'right of common' see PARA 405.
- 4 I.e. a right of common to which the Commons Act 2006 s 9 applies: see PARA 498.
- 5 As to the meaning of 'land' see PARA 403 note 1.
- 6 Commons Act 2006 Sch 1 para 3(1).
- 7 Commons Act 2006 Sch 1 para 3(2). Any such orders, being local in nature, are not recorded in this work.
- 8 Commons Act 2006 Sch 1 para 3(3).
- 9 As to the meaning of 'owner of land' see PARA 430 note 5.
- 10 Commons Act 2006 Sch 1 para 3(4).
- 11 Commons Act 2006 Sch 1 para 3(5)(a).
- 12 Commons Act 2006 Sch 1 para 3(5)(b).
- 13 Commons Act 2006 Sch 1 para 3(6).
- 14 I.e. provision under the Commons Act 2006 Sch 1 para 3(1): see the text and notes 1-6.
- 15 As to the meaning of 'regulations' see PARA 602 note 7.
- 16 I.e. an application under the Commons Act 2006 Sch 1. In relation to the pilot areas in England, an application made under Sch 1 para 3(7)(b) (see head (ii) in the text), for the purpose of registering a transferee as the owner of a right of common upon the authorisation by order made under Sch 1 para 3(1) of the severance of that right, may only be made by a person to whom the right of common to be severed is to be transferred, further to provision made by an order under Sch 1 para 3(1): Commons Registration (England) Regulations 2008, SI 2008/1961, Sch 4 para 13(1). The application must show that the owner of the land to which the right of common is attached consents to the application: Sch 4 para 13(2). The application must include (1) the name and statutory instrument number of the order providing for the severance by transfer to which the application relates; (2) the numbers of the register unit and the rights section entry in the register of common land or town or village greens for the right of common to which the application relates; (3) a description of the land to which the right of common is attached and from which it is to be severed, and evidence of the ownership of that land; and (4) evidence that any requirement imposed by the provision in the order made under the Commons Act 2006 Sch 1 para 3(1) and applicable to the transfer in question has been met: Commons Registration (England) Regulations 2008, SI 2008/1961, Sch 4 para 13(3). Where it relates to only part of a right of common, the application must identify that part of the land to which it is attached and must be accompanied by an application made for the purposes of the Commons Act 2006 s 8 (apportionment: see PARA 522): Commons Registration (England) Regulations 2008, SI 2008/1961, Sch 4 para 13(4); and see PARA 522 note 21. In addition to the persons and bodies listed in Sch 6 para 1 (see PARA 550 note 24), the application must be served on the owner of the land over which the right of common is exercisable (other than the applicant): Sch 6 para 2, Table. As to register units see reg 6; and PARA 549; as to the pilot areas in England see PARA 467 text and notes 29-30; as to applications in relation to those areas see generally Pt 3 (regs 15-38); and PARAS 540, 549 et seq; as to the fee to accompany the application see PARA 549 note 11; as to the service of documents see PARA 532 note 17; and as to land descriptions see reg 19; and PARA 468 note 7.
- 17 As to the meanings of 'register of common land' and 'register of town or village greens' see PARA 424 notes 7, 12; as to registration see PARA 506 et seq; and as to land which may be registered in England and Wales as a town or village green under the Commons Act 2006 see s 15; and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 541.
- 18 Commons Act 2006 Sch 1 para 3(7). Subject to any provision made by or under Pt 1 (ss 1-25) (not fully in force), an application made for the purposes of Sch 1 para 3 must be granted: see s 24(4).

19 See note 14.

20 Commons Act 2006 Sch 1 para 3(8).

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/2. RIGHTS OF COMMON AND RELATED RIGHTS/(5) EXTINGUISHMENT AND SUSPENSION OF RIGHTS OF COMMON/(iv) Abandonment or Release/502. Abandonment.

(iv) Abandonment or Release

502. Abandonment.

At common law, if a person who has acquired a right of common fails for a long period of time to exercise it, he may lose the right if circumstances permit of the presumption that he has abandoned it¹; but mere non-user, though evidence of abandonment, is not conclusive evidence. Abandonment requires a fixed intention never to exercise the right again or to attempt to transmit it to anyone else². The period of time during which the right has not been used is material only as an element from which the intention to abandon the right may be inferred. In each case the particular circumstances must be examined to ascertain the intention³, the number of times the right had been exercised being immaterial if the claimant proves that he exercised it as often as he chose⁴. Non-user for 20 years has been held not to raise a presumption of abandonment⁵. If the non-user is accompanied by circumstances which show an intentional abandonment, such as the pulling down of a house to which a right of common of turbary⁶ or estovers⁷ is attached, prima facie the right of common will cease, but if an intention to build another house is shown, the right continues⁸. If the cesser has been during a period in which the commoner had no stock to turn out, the right will not be extinguished⁹.

In all cases of alteration of the commoner's holding the question to be determined from the circumstances of each case is whether or not an intention to abandon the right can reasonably be presumed. An alteration of the character of the land to which a right of pasture is appendant or appurtenant¹⁰ effects an extinguishment of the right at common law if, as a result of the alteration, no cattle¹¹ can be kept upon the land or be maintained from its produce; in such a case a release of the right will be presumed¹², as, for instance, if a row of houses is built upon the land or a reservoir made, so that it cannot be restored to its original state or at least not without great difficulty. If the alteration is such that the land might easily be turned again to the purpose of feeding cattle, the right will not be extinguished; so long as it can be supposed that the commoner may have the intention of resuming his right of pasture, the right will remain in suspense though the accommodation for cattle may be destroyed¹³.

However, the Commons Act 2006 now provides that a right of common¹⁴ which is registered in a register of common land or town or village greens¹⁵ cannot be extinguished by operation of common law¹⁶ and can only be removed from the registers as provided by statute¹⁷. At the date at which this volume states the law, these provisions were in force only in relation to the pilot areas in England¹⁸.

1 The earlier authorities are clear on the point that a right of common may be lost by non-user: see Bract 223; and Elton on Commons 133-134. The value of rights of common is nowadays comparatively small in many places, and in recent cases these rights have been claimed more for the purpose of preserving open spaces than on account of their intrinsic value.

2 *Tehidy Minerals Ltd v Norman* [1971] 2 QB 528, [1971] 2 All ER 475, CA. See also *Re Yateley Common, Hampshire, Arnold v Dodd* [1977] 1 All ER 505, [1977] 1 WLR 840 (no intention to abandon where commoners were prohibited from exercising their rights while land was requisitioned as an aerodrome). Cf where the owner of a right of common has stood by while the owner of the servient tenement has acted to his detriment, when a release will be readily implied: *Anon* (1726) 6 Vin Abr 182; *Wimbledon and Putney Commons Conservators v Nicol* (1894) 10 TLR 247.

3 This statement is based to a great extent on the analogy of cases relating to the abandonment of easements. See *Ward v Ward* (1852) 7 Exch 838; *R v Chorley* (1848) 12 QB 515 (rights of way); *Stokoe v*

Singers (1857) 8 E & B 31; *Moore v Rawson* (1824) 3 B & C 332 (rights to light), where, at 339, Littledale J suggested that the same considerations might apply to rights of common.

4 See *Carr v Foster* (1842) 3 QB 581 at 588 per Patteson J; cf *Flight v Thomas* (1840) 11 Ad & El 688, Ex Ch (right to light); *Eaton v Swansea Waterworks Co* (1851) 17 QB 267 (right to water); *Bailey v Appleyard* (1838) 8 Ad & El 161 at 168 n; *Payne v Shedden* (1834) 1 Mood & R 382. In *Musgrave v Inclosure Comrs* (1874) LR 9 QB 162, a right of pasturage usually enjoyed with a demesne farm of the lord of the manor was held not to have been abandoned though no stock had been turned out for upwards of ten years.

5 *Benn v Harding* (1992) 66 P & CR 246.

6 As to common of turbary see PARAS 457-458.

7 As to common of estovers see PARAS 459-460.

8 The destruction of an ancient house to which the right of common is appurtenant does not necessarily operate as an abandonment of the right. The right may be enjoyed as appurtenant to a new house erected in continuance of the ancient house, provided that no greater burden is imposed upon the servient land. Whether the new house is or is not in continuance of the ancient house is a question of fact but in order to be a continuance of the ancient house, it is not necessary that the new house should be built upon the foundations of the ancient house: *A-G v Reynolds* [1911] 2 KB 888. See also *Moore v Rawson* (1824) 3 B & C 332 at 337 per Holroyd J; *R v Chorley* (1848) 12 QB 515 at 519 per Denman CJ; *Luttrell's Case* (1601) 4 Co Rep 84b at fo 86a. See also *Moore v Rawson* (1824) 3 B & C 332 at 337 per Holroyd J; and see PARA 457.

9 *Carr v Foster* (1842) 3 QB 581.

10 As to the distinction between rights of common appendant and appurtenant see PARA 433 note 4. As to appendant rights see PARAS 433-438; and as to appurtenant rights see PARAS 439-445.

11 As to the meaning of 'cattle', and as to the animals in respect of which rights of common may be exercised, see PARA 436 note 1.

12 *Carr v Lambert* (1866) LR 1 Exch 168, Ex Ch, where Willes J enunciated the principles and illustrations stated in the text which have since been generally approved. But see *Re Yateley Common, Hampshire, Arnold v Dodd* [1977] 1 All ER 505, [1977] 1 WLR 840 (splitting up commoner's land into smaller domestic units did not constitute an alteration in the character of the land).

13 *Carr v Lambert* (1866) LR 1 Exch 168, Ex Ch.

14 As to the meaning of 'right of common' for these purposes see PARA 405.

15 As to the meanings of 'register of common land' and 'register of town and village greens' see PARA 424 notes 7, 12.

16 See the Commons Act 2006 s 13(3) (not fully in force); and PARA 493.

17 See the Commons Act 2006 s 3(6) (not fully in force); and PARAS 493, 527.

18 See the Commons Act 2006 (Commencement No 4 and Savings) (England) Order 2008, SI 2008/1960, art 2(1)(a), (b). As to the pilot areas in England see PARA 467 text and notes 29-30.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/2. RIGHTS OF COMMON AND RELATED RIGHTS/(5) EXTINGUISHMENT AND SUSPENSION OF RIGHTS OF COMMON/(iv) Abandonment or Release/503. Express release or other acts.

503. Express release or other acts.

At common law, a right of common may be extinguished by a release of the right to the owner of the soil, and in several early cases it was held that by a release of any part of the right, even yielding up the profit in one acre only, the right of common in the whole of the land was gone¹. A release in express words must be by deed²; but a release may be presumed from acts showing the intention, as by a licence to inclose part of the land, which has been held good by way of release³. An inclosure under such a licence would not be lawful without the consent of the Secretary of State or the Welsh Ministers⁴.

However, the Commons Act 2006 now provides that a right of common⁵ which is registered in a register of common land or town or village greens⁶ cannot be extinguished by operation of common law⁷ and can only be removed from the registers as provided by statute⁸. At the date at which this volume states the law, these provisions were in force only in relation to the pilot areas in England⁹.

1 *Rotherham v Green* (1597) Cro Eliz 593; *Morse and Webb's Case* (1610) 13 Co Rep 65; *Miles v Etteridge* (1692) 1 Show 349. In these cases the reason given was that the common is entire throughout the whole land; therefore a release in part discharged the whole. Doubts have been entertained as to the correctness of this view (see *Benson v Chester* (1799) 8 Term Rep 396 at 401 per Lord Kenyon), but in *Johnson v Barnes* (1873) LR 8 CP 527, Ex Ch (where the right in question was held to be an exclusive right of pasture, and not a right of common), it was urged in argument without dispute, and adopted by the court as good law. The real reason was alleged by Willes J, in the court below (see *Johnson v Barnes* (1872) LR 7 CP 592 at 600), to be that it casts a greater burden on the rest of the land. For a full discussion of *Rotherham v Green* (1597) Cro Eliz 593 and partial release see Gadsden *The Law of Commons* (1988) p 146 et seq.

2 Co Litt 264b.

3 *Miles v Etteridge* (1692) 1 Show 349. As to the use of the terms 'inclose', 'inclosure' etc see PARA 418 note 2; and as to inclosure see generally PARA 418 et seq.

4 See PARA 568. As to the Secretary of State, and the transfer of powers in relation to Wales to the Welsh Ministers, see PARA 423.

5 As to the meaning of 'right of common' for these purposes see PARA 405.

6 As to the meanings of 'register of common land' and 'register of town and village greens' see PARA 424 notes 7, 12.

7 See the Commons Act 2006 s 13(3) (not fully in force); and PARA 493.

8 See the Commons Act 2006 s 3(6) (not fully in force); and PARAS 493, 527.

9 See the Commons Act 2006 (Commencement No 4 and Savings) (England) Order 2008, SI 2008/1960, art 2(1)(a), (b). As to the pilot areas in England see PARA 467 text and notes 29-30.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/2. RIGHTS OF COMMON AND RELATED RIGHTS/(5) EXTINGUISHMENT AND SUSPENSION OF RIGHTS OF COMMON/(v) Agreement or Encroachment/504. Agreement between owner of the soil and commoners.

(v) Agreement or Encroachment

504. Agreement between owner of the soil and commoners.

As the lord of the manor or other owner or owners of the soil of a common and the persons entitled to rights of common over it represent all the interests in the land, under the common law they can extinguish the rights of common by mutual agreement, provided that all agree, and that they are all legally capable of entering into an agreement for the purpose. However, if rights are extinguished and the land is still waste (which most common land is) then it becomes waste of the manor not subject to rights of common and hence is still registrable as common land¹, irrespective of the date when the land ceased to be parcel of a manor².

The Commons Act 2006 now provides that a right of common³ which is registered in a register of common land or town or village greens⁴ cannot be extinguished by operation of common law⁵ and can only be removed from the registers as provided by statute⁶. At the date at which this volume states the law, these provisions were in force only in relation to the pilot areas in England⁷.

1 See the Commons Registration Act 1965 s 22(1); and PARA 407.

2 *Hampshire County Council v Milburn*[1991] 1 AC 325, [1990] 2 All ER 257, HL. As a consequence of such registration, public rights of access under the Countryside and Rights of Way Act 2000 apply: see PARA 580; and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 578 et seq.

3 As to the meaning of 'right of common' for these purposes see PARA 405.

4 As to the meanings of 'register of common land' and 'register of town and village greens' see PARA 424 notes 7, 12.

5 See the Commons Act 2006 s 13(3) (not fully in force); and PARA 493.

6 See the Commons Act 2006 s 3(6) (not fully in force); and PARAS 493, 527.

7 See the Commons Act 2006 (Commencement No 4 and Savings) (England) Order 2008, SI 2008/1960, art 2(1)(a), (b). As to the pilot areas in England see PARA 467 text and notes 29-30.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/2. RIGHTS OF COMMON AND RELATED RIGHTS/(5) EXTINGUISHMENT AND SUSPENSION OF RIGHTS OF COMMON/(v) Agreement or Encroachment/505. Encroachment on the waste.

505. Encroachment on the waste.

Before the passing of the Real Property Limitation Act 1833¹ it was held that rights of common might be lost upon part of the waste by an encroachment² which had become lawful by lapse of time, for a commoner was in no better position than a lord of a manor whose right of entry had become barred by limitation³. Incorporeal hereditaments are, however excepted from the definition of 'land' in the Limitation Act 1980 and are not included in the definition of 'land' in the Land Registration Act 2002⁴; thus it seems that a right of common cannot be lost by adverse possession⁵. There have, nevertheless, been many encroachments on common land. Common land cannot now be fenced off without the consent of the appropriate national authority⁶.

Registration under the Commons Registration Act 1965 or the Commons Act 2006 is conclusive of the status of the land at the time of registration⁷. Under the Commons Act 2006, a right of common can only be removed from the registers as provided by statute⁸.

1 The Real Property Limitation Act 1833 has been repealed.

2 Encroachments were known as assarts in medieval times. Initially an assart was often a trespass but as time passed the lord of the manor often granted a licence to assart subject to a regular payment in the manor court. These assarts might become copyhold or leasehold or freehold depending on the circumstances. Even though in theory an encroachment could not extinguish rights of common (it probably did extinguish commonable rights) in practice they would be treated as abandoned (see PARA 502) after a few years especially if the encroachment became enclosed arable or a house. Inclosure acts often included power to allot and rearrange 'ancient inclosures'.

Encroachments made from the waste by a tenant will be presumed to have been made for the benefit of his landlord unless it clearly appears from some act done at the time that the tenant intended to make the encroachment for his own benefit, and not to hold it as he held the farm to which the encroachments were adjacent: *Doe d Lewis v Rees* (1834) 6 C & P 610 per Parke B. This doctrine, though questioned (see *Doe d Colclough v Mulliner* (1795) 1 Esp 460 per Lord Kenyon; *Andrews v Hailes* (1853) 2 E & B 349 at 353 per Lord Campbell CJ) has been adopted in subsequent cases: see *Doe d Croft and Skinner v Tidbury* (1854) 14 CB 304; *Doe d Lloyd v Jones* (1846) 15 M & W 580; *Andrew v Hailes* (1853) 2 E & B 349; *Kingsmill v Millard* (1855) 11 Exch 313; *Whitmore v Humphries* (1871) LR 7 CP 1 at 5 per Willes J; and see also *A-G v Tomline* (1880) 15 ChD 150 at 160, CA, per Cotton LJ, approving *Whitmore v Humphries*; *Nesbitt v Mablethorpe UDC* [1918] 2 KB 1, CA. It is, however, better to say that the tenant is estopped from disputing the title of the lord to the encroachment as much as to the rest of the holding (*Andrews v Hailes* (1853) 2 E & B 349 at 353 per Campbell CJ), or that the encroachment is annexed to the holding (*Kingsmill v Millard* (1855) 11 Exch 313 at 319-320 per Parke B and Alderson B; and see *Nesbitt v Mablethorpe UDC* [1918] 2 KB 1, CA). This doctrine is further considered in **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARAS 195-197.

3 See *Creach v Wilmot* (1752) 2 Taunt 160n; *Hawke v Bacon* (1809) 2 Taunt 156, recognised in *Tapley v Wainwright* (1833) 5 B & Ad 395.

4 See **LIMITATION PERIODS** vol 68 (2008) PARA 1018.

5 As to adverse possession of land see **LIMITATION PERIODS** vol 68 (2008) PARA 1016 et seq.

6 See the Commons Act 2006 s 38(1), (2)(a), (3)(a); and PARA 612. At the date at which this volume states the law, s 38 was not in force in relation to Wales. As to the meaning of 'appropriate national authority' see PARA 411 note 1.

7 See the Commons Registration Act 1965 s 10; the Commons Act 2006 s 18; and PARAS 508, 529. See also *President and Scholars of Corpus Christi College, Oxford v Gloucestershire County Council* [1983] QB 360, [1982] 3 All ER 995, CA.

8 See the Commons Act 2006 s 3(6) (not fully in force); and PARAS 493, 527. At the date at which this volume states the law, s 3 was in force only in relation to the pilot areas in England: see the Commons Act 2006 (Commencement No 4 and Savings) (England) Order 2008, SI 2008/1960, art 2(1)(a), (b). As to the pilot areas in England see PARA 467 text and notes 29-30.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/3. REGISTRATION OF COMMON LAND/(1) INTRODUCTION/506. Outline of legislation.

3. REGISTRATION OF COMMON LAND

(1) INTRODUCTION

506. Outline of legislation.

At the date at which this volume states the law, the legislation regulating the registration of commons was in a state of transition. The majority of the provisions of the Commons Registration Act 1965 relating to registration¹ had been repealed in relation to the pilot areas in England², but remained in force in the remainder of England and in Wales. When fully in force, Part 1 of the Commons Act 2006³ will replace the provisions of the 1965 Act, but at the date at which this volume states the law the majority of the provisions of Part 1 were in force only in relation to the pilot areas in England⁴.

The Commons Registration Act 1965 was intended to establish definitive registers of common land and town and village greens in England and Wales and to record details of rights of common. Subject to specified exemptions⁵, registration authorities⁶ were to register land which is common land⁷ or a town or village green⁸, rights of common⁹ over such land and the ownership of such land¹⁰. The closing date for applications for registration was 2 January 1970¹¹ and the initial period for registration expired on 31 July 1970¹². After the latter date, any land capable of being registered under the 1965 Act which had not in fact been registered was deemed not to be common land or a town or village green and no rights of common were to be exercised over any such land unless they had been registered¹³. Registration was at first provisional¹⁴ and objections were to be referred to a Commons Commissioner¹⁵ who inquired into the matter and could confirm, modify or refuse to confirm the registration¹⁶. After the expiration of the time limited for appeals, or the final disposal of an appeal, the provisional registration became final¹⁷. Final registration is conclusive of the matters registered¹⁸. Limited provision was made for amendment and rectification of the registers¹⁹.

In practice the task of establishing registers was complex and the 1965 Act proved to have deficiencies. For example, some land provisionally registered under the Act was wrongly struck out, and other common land was overlooked and never registered. Many town or village greens became registered as common land and some grazing rights were registered far in excess of the carrying capacity of the common. Furthermore, regulations made under the Act did not provide for sufficient notification of applications made for provisional registration of common land and rights of common, so that many provisional registrations became final without any objections and thus without independent appraisal of the claim made in the application²⁰. The Court of Appeal held that even where land had clearly been wrongly registered as common land, the Act provided no mechanism to enable such land to be removed from the register once the registration had become final²¹.

Part 1 of the Commons Act 2006 provides for commons registration authorities to continue to keep registers of common land and town or village greens, and permits amendments to be made to the registers in accordance with the provisions in that Part, replacing and improving the registration system under the 1965 Act, but using the same registers prepared under that Act²². In particular, Part 1 of the 2006 Act includes provisions for:

- 128 (1) the amendment of the registers upon the occurrence of registrable events, such as the disposition of rights of common, statutory dispositions of common land,

- for example under compulsory purchase legislation, and the creation of new town or village greens²³;
- 129 (2) the prohibition of the severance of a registered right of common from any land to which it is attached, subject to certain exceptions²⁴;
- 130 (3) the deregistration of common land and registration of other land as common land in exchange, subject to the consent of the appropriate national authority²⁵;
- 131 (4) the correction of errors in the registers by commons registration authorities²⁶;
- 132 (5) the establishment of electronic registers²⁷;
- 133 (6) powers to rectify mistakes made in registers under the 1965 Act²⁸, and transitional powers to register events which occurred while the 1965 Act was in force²⁹; and
- 134 (7) ensuring that only registered rights of common may be exercised over land to which Part 1 applies³⁰.

1 le the Commons Registration Act 1965 ss 1-7, 10-12, 13(c), 14-16, 19: see PARA 508 et seq.

2 See the Commons Act 2006 Sch 6 Pt 1; the Commons Act 2006 (Commencement No 4 and Savings) (England) Order 2008, SI 2008/1960, art 2(1)(h). As to the pilot areas in England see PARA 467 text and notes 29-30.

3 le the Commons Act 2006 Pt 1 (ss 1-25) (not fully in force).

4 See PARA 403 note 7.

5 See the Commons Registration Act 1965 s 11; and PARA 509.

6 As to the registration authorities see PARA 507.

7 As to the meaning of 'common land' for registration purposes see PARA 407.

8 As to the meaning of 'town or village green' see PARA 401 note 1. See further **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 532 et seq.

9 As to the meaning of 'right of common' for registration purposes see PARA 405.

10 See the Commons Registration Act 1965 s 1: and PARA 507.

11 Commons Registration (Time Limits) Order 1966, SI 1966/1470, art 3.

12 Commons Registration (Time Limits) Order 1966, SI 1966/1470, art 2 ((amended by SI 1970/383).

13 See the Commons Registration Act 1965 s 1(2); and PARA 508.

14 See the Commons Registration Act 1965 s 4; and PARA 508.

15 As to the Commons Commissioners see PARA 425.

16 See the Commons Registration Act 1965 s 6; and PARA 511.

17 See the Commons Registration Act 1965 ss 6, 7; and PARA 511.

18 See the Commons Registration Act 1965 s 10; and PARA 508.

19 See the Commons Registration Act 1965 ss 13, 14; and PARAS 516, 519.

20 See the Explanatory Notes to the Commons Act 2006 para 17.

21 See *President and Scholars of Corpus Christi College, Oxford v Gloucestershire County Council* [1983] QB 360, [1982] 3 All ER 995, CA. In *G & K Ladenbau (UK) Ltd v Crawley & de Reya* [1978] 1 All ER 682, [1978] 1 WLR 266 the parties arranged for the successor of the lord of the manor to release rights and that apparently persuaded the registration authority to cancel the registration even though it had become final; but it is doubtful if that procedure would now succeed following *Hampshire County Council v Milburn* [1991] 1 AC 325, [1990] 2 All ER 257, HL (see PARA 516 note 2).

22 As to the registers and the commons registration authorities see the Commons Act 2006 ss 1-4 (not fully in force); and PARAS 507, 526-527. See also the Explanatory Notes to the Commons Act 2006 para 27.

23 See the Commons Act 2006 ss 10-15 (not fully in force); PARAS 493, 523-525, 544; and (in relation to s 15) **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 541. See also the Explanatory Notes to the Commons Act 2006 para 28.

24 See the Commons Act 2006 s 9, Sch 1; and PARAS 498-501. See also the Explanatory Notes to the Commons Act 2006 para 28. The Commons Act 2006 s 9 and Sch 1 are deemed to have come into force on 28 June 2005: see s 9(7).

25 See the Commons Act 2006 ss 16, 17 (not fully in force); and PARA 545 et seq. See also the Explanatory Notes to the Commons Act 2006 para 28. As to the meaning of 'appropriate national authority' see PARA 411 note 1.

26 See the Commons Act 2006 s 19 (not fully in force); and PARA 534. See also the Explanatory Notes to the Commons Act 2006 para 28.

27 See the Commons Act 2006 s 25 (not yet in force); and PARA 531. See also the Explanatory Notes to the Commons Act 2006 para 28.

28 See the Commons Act 2006 s 22, Sch 2 (not fully in force); and PARA 535 et seq. See also the Explanatory Notes to the Commons Act 2006 para 28.

29 See the Commons Act 2006 s 23, Sch 3 (not fully in force); and PARA 541 et seq. See also the Explanatory Notes to the Commons Act 2006 para 28.

30 See the Commons Act 2006 ss 2(1)(b), (2)(b), 6, 18 (not fully in force); and PARAS 467, 526, 529. See also the Explanatory Notes to the Commons Act 2006 para 28.

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507. The registration authorities.

The following are commons registration authorities¹:

- 135 (1) a county council in England;
- 136 (2) a district council in England for an area without a county council;
- 137 (3) a London borough council; and
- 138 (4) a county or county borough council in Wales².

For the purposes of Part 1 of the Commons Act 2006³, the commons registration authority in relation to any land⁴ is the authority in whose area the land is situated⁵.

Where any land falls within the area of two or more commons registration authorities, the authorities may by agreement provide for one of them to be the commons registration authority in relation to the whole of the land⁶.

In relation to the pilot areas in England⁷, the Secretary of State⁸ may appoint:

- 139 (a) the Planning Inspectorate⁹ as eligible to carry out the administration of applications¹⁰ made to, or proposals¹¹ made by, a registration authority, which are referred¹² by the registration authority to the Planning Inspectorate; and
- 140 (b) any person who is employed or otherwise engaged as one of the inspectors of the Planning Inspectorate, or is employed on its staff, as eligible to:

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- 11. (i) determine an application or proposal which a registration authority has referred¹³ to the Planning Inspectorate; and
- 12. (ii) carry out any steps necessary for or incidental to that purpose (for example, conducting a public inquiry, a hearing or a site visit)¹⁴.

10

1 Every registration authority must have an official stamp for the purposes of the Commons Registration Act 1965 or, in relation to the pilot areas in England, for the purposes of the Commons Act 2006: see the Commons Registration (General) Regulations 1966, SI 1966/1471, reg 3(1); the Commons Registration (England) Regulations 2008, SI 2008/1961, reg 3(1). A requirement for a registration authority to stamp any document is a requirement to cause an impression of the official stamp to be affixed to it, bearing the date mentioned in the requirement or (where no date is mentioned in the requirement) the date when the stamp is affixed: see the Commons Registration (General) Regulations 1966, SI 1966/1471, reg 3(2); the Commons Registration (England) Regulations 2008, SI 2008/1961, reg 3(2). As to the registration authorities for the pilot areas in England see PARA 467 text and notes 29-30.

The registration authorities were entitled to be heard at any hearing before a Commons Commissioner of a dispute as to the registration of any land as common land or as a town or village green under the Commons Registration Act 1965, or relating to the question of the ownership of any unclaimed land (Commons Commissioners Regulations 1971, SI 1971/1727, reg 19(1)(b), (4)(c)), and were to be sent a copy of the decision of a Commissioner upon any matter referred to him under the Commons Registration Act 1965 (Commons Commissioners Regulations 1971, SI 1971/1727, reg 30(3)(a)). When a disputed registration has become final or void the Commissioner must inform the registration authority of the fact: reg 32. As to the Commons Commissioners see PARA 425. As to the meaning of 'common land' for these purposes see PARA 407; and as to the ownership of land for these purposes see PARA 508 note 4.

2 Commons Act 2006 s 4(1), replacing the Commons Registration Act 1965 s 2(1) (which was amended by the Local Government Act 1972 Sch 30; the Local Government Act 1985 Sch 8 para 10(6)). The Commons Registration Act 1965 s 2 is repealed in relation to the pilot areas in England by virtue of SI 2008/1960 and is prospectively repealed, in relation to the whole of England and Wales, by the Commons Act 2006 Sch 6 Pt 1, as

from a day to be appointed under s 56(1); at the date at which this volume states the law, however, no such day had been appointed. As to the authorities referred to in heads (1)-(4) in the text see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq.

3 Ie the Commons Act 2006 Pt 1 (ss 1-25) (not fully in force). As to registration under Pt 1 see PARA 521 et seq.

4 As to the meaning of 'land' for registration purposes see PARA 403 note 1.

5 Commons Act 2006 s 4(2). The Commons Registration Act 1965 s 2(1) (repealed and prospectively repealed (see note 2)), makes similar provision.

6 Commons Act 2006 s 4(3); and see the Commons Registration Act 1965 s 2(2) (repealed and prospectively repealed (see note 2)) which makes similar provision. Without prejudice to the making of any new agreement under s 2(2), any agreement under s 2(2) in force immediately before 1 April 1974 ceased to have effect (as a consequence of the reorganisation of local government boundaries effected by that Act) on that day: Local Government Act 1972 s 189(1).

Particulars of any agreement under the Commons Registration Act 1965 s 2(2) or the Commons Act 2006 s 4(3) to which the registration authority is a party must be shown in the general part of the register of common land: see the Commons Registration (General) Regulations 1966, SI 1966/1471, reg 4(2)(a); the Commons Registration (England) Regulations 2008, SI 2008/1961, reg 5(2)(a). As to the register see generally PARAS 510 et seq, 526 et seq.

7 As to the pilot areas in England see PARA 467 text and notes 29-30.

8 As to the Secretary of State see PARA 423.

9 As to the meaning of 'the Planning Inspectorate' see PARA 522 note 19.

10 For these purposes, 'application', except in the Commons Registration (England) Regulations 2008, SI 2008/1961, reg 49 (see PARA 548), means an application to a registration authority under the Commons Act 2006 Pt 1 (ss 1-25) or the Commons Registration (England) Regulations 2008, SI 2008/1961, to amend its register of common land or its register of town or village greens: reg 2(1).

11 For these purposes, 'proposal', except in the Commons Registration (England) Regulations 2008, SI 2008/1961, reg 46(1) (see PARA 544), means a proposal by a registration authority to amend a register on its own initiative, pursuant to (1) the Commons Act 2008 s 19 (see PARA 534); (2) Sch 2 (see PARA 535 et seq); or (3) Sch 3 para 2 (see PARA 541): Commons Registration (England) Regulations 2008, SI 2008/1961, reg 2(1).

12 Ie in accordance with the Commons Registration (England) Regulations 2008, SI 2008/1961.

13 See note 12.

14 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 4.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/3. REGISTRATION OF COMMON LAND/(1) INTRODUCTION/508. The requirement for registration.

508. The requirement for registration.

All common land¹ and town or village greens², together with the rights of common³ claimed over them and the ownership of them⁴, were required to have been registered during the period from 2 January 1967⁵ to 31 July 1970⁶ inclusive⁷. Failing such registration, no land capable of being so registered was deemed to be common land or a town or village green unless it was so registered⁸ and no rights of common were exercisable over any such land unless such rights were subsequently registered⁹.

Registration under the Commons Registration Act 1965 was, in the first instance, provisional only¹⁰. Registrations to which no objections were lodged, or all the objections to which were withdrawn, became final on 31 July 1972¹¹, and if an objection was withdrawn after that date, registration became final on the date of withdrawal¹². Disputed registrations were referred to a Commons Commissioner¹³ and became either final or void, if no appeal was lodged against his decision, at the end of the period during which an appeal could have been lodged, or, if such an appeal was lodged, when it was finally disposed of¹⁴. In the case, however, of certain land or rights in England whose provisional registration in the register of common land or town or village greens could not otherwise become final in consequence of a court order¹⁵, an objection might be lodged with the registration authority between 6 April 2007 and 6 August 2007¹⁶.

The registration under the Commons Registration Act 1965 of any land as common land or as a town or village green, or of any rights of common over such land, is conclusive evidence of the matters registered, as at the date of registration, except where the registration is provisional only¹⁷. When determining whether to confirm the provisional registration of land as common land, a Commons Commissioner was required to consider the position at the date of hearing rather than at the date of registration if an event occurring after the date of registration extinguished a right of common which was claimed¹⁸.

The statutory provisions existing at the time of the introduction of the registration scheme concerning public rights of access over commons and waste lands¹⁹ and restricting the inclosure of commons²⁰ were not affected by the registration requirements²¹.

Part 1 of the Commons Act 2006 makes further provision with regard to registration²².

1 As to the meaning of 'common land' for these purposes see PARA 407; and as to the meaning of 'land' see PARA 403 note 1. The Commons Registration Act 1965 applies in relation to land in which there is a Crown or Duchy interest as it applies in relation to land in which there is no such interest: s 23(1) (s 23 prospectively repealed by the Commons Act 2006 Sch 6 Pt 1, as from a day to be appointed under s 56(1); at the date at which this title states the law, no such day had been appointed). 'Crown or Duchy interest' means an interest belonging to Her Majesty in right of the Crown or of the Duchy of Lancaster, or belonging to the Duchy of Cornwall, or belonging to a government department, or held in trust for Her Majesty for the purposes of a government department: Commons Registration Act 1965 s 23(2) (prospectively repealed). Certain land is, however, exempt from the registration requirement: see s 11; and PARA 509.

2 As to the meaning of 'town or village green' see PARA 401 note 1.; and as to land which may be registered in England and Wales as a town or village green see now the Commons Act 2006 s 15; and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 541.

3 As to the meaning of 'rights of common' for registration purposes see PARA 405.

4 References in the Commons Registration Act 1965 to the ownership and the owner of any land are references to the ownership of a legal estate in fee simple in any land and to the person holding that estate: s 22(2) (s 22 prospectively repealed by the Commons Act 2006 Sch 6 Pt 1, as from a day to be appointed under s 56(1); at the date at which this title states the law, no such day had been appointed). When the ownership of

land has been registered under the Commons Registration Act 1965 and the registration authority is subsequently notified by the Chief Land Registrar that the land has been registered in the register of title, the authority must delete the registration of ownership under the Commons Registration Act 1965 and indicate in the register that it has been registered in the register of title: Commons Registration Act 1965 s 12 (amended by the Land Registration Act 1997 Sch 2 Pt 1; and by the Land Registration Act 2002 Sch 11 para 7(1), (4); repealed in relation to the pilot areas in England by virtue of SI 2008/1960; prospectively repealed in relation to the whole of England and Wales by the Commons Act 2006 Sch 6 Pt 1, as from a day to be appointed under s 56(1); at the date at which this title states the law, no such day had been appointed). 'Register of title' means the register kept under the Land Registration Act 2002 s 1 (see **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 810 et seq): Commons Registration Act 1965 s 22(1) (definition added by the Land Registration Act 2002 Sch 11 para 7(1), (5); and prospectively repealed). As to the registration authorities see PARA 507; and as to the pilot areas see PARA 467 text and notes 29-30.

5 le the date specified as the first day for registration under the Commons Registration Act 1965 by the Commons Registration (Time Limits) Order 1966, SI 1966/1470, art 2 (amended by SI 1970/383). This is also the date on which the substantive provisions of the Commons Registration Act 1965 were brought into force by the Commons Registration Act 1965 (Commencement No 2) Order 1966, SI 1966/971.

6 le the date specified as the last day for registration under the Commons Registration Act 1965 by the Commons Registration (Time Limits) Order 1966, SI 1966/1470, art 2 (amended by SI 1970/383). Note, however, that the last date for lodging applications for registration was 2 January 1970: see the Commons Registration Act 1965 s 4(6); and the Commons Registration (Time Limits) Order 1966, SI 1966/1470, art 3.

7 See the Commons Registration Act 1965 s 1(1) (s 1 repealed in relation to the pilot areas in England by virtue of SI 2008/1960; prospectively repealed in relation to the whole of England and Wales by the Commons Act 2006 Sch 6 Pt 1, as from a day to be appointed under s 56(1); at the date at which this title states the law, no such day had been appointed). No rights of common over land which is capable of being registered under the Commons Registration Act 1965 may be registered in the register of title (ie they cannot be registered as appurtenant to registered land): Commons Registration Act 1965 s 1(1) (s 1 amended by the Land Registration Act 2002 Sch 11 para 7(1), (2); repealed and prospectively repealed).

8 See the Commons Registration Act 1965 s 1(2)(a) (as amended, repealed and prospectively repealed: see note 7). See also *Oxfordshire County Council v Oxford City Council* [2006] UKHL 25 at [18], [2006] 2 AC 674 at [18], [2006] 4 All ER 817 at [18] per Lord Hoffmann (a case on town and village greens).

9 See the Commons Registration Act 1965 s 1(2)(b) (as amended, repealed and prospectively repealed: see note 7). Subsequent registration for these purposes is either registration under the Commons Registration Act 1965 or registration in the register of title: s 1(2) (as so amended and repealed). Unregistered rights were not merely unexercisable but were extinguished (*Central Electricity Generating Board v Clwyd County Council* [1976] 1 All ER 251, [1976] 1 WLR 151), and even statutory awards of rights of common were extinguished if not registered (*Re Turnworth Down, Dorset* [1978] Ch 251, [1977] 2 All ER 105). Dicta in *R v Suffolk County Council, ex p Steed* (1996) 75 P & CR 102 at 112-113, CA, per Pill LJ that failure to register a town or village green does not extinguish customary rights over the land were held to be incorrect in *Oxfordshire County Council v Oxford City Council* [2006] UKHL 25 at [18], [2006] 2 AC 674 at [18], [2006] 4 All ER 817 at [18] per Lord Hoffmann. As to town and village greens see further **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 532 et seq.

The repeal by the Commons Act 2006 of the Commons Registration Act 1965 s 1(2)(b) does not affect the extinguishment of rights of common occurring by virtue of that provision: Commons Act 2006 Sch 3 para 6 (not fully in force).

10 See the Commons Registration Act 1965 s 4(5) (repealed in relation to the pilot areas in England by virtue of SI 2008/1960; prospectively repealed in relation to the whole of England and Wales by the Commons Act 2006 Sch 6 Pt 1, as from a day to be appointed under s 56(1); at the date at which this title states the law, no such day had been appointed). Rights of common are 'registered' within the meaning of the Commons Registration Act 1965 whether the registration is provisional or final and provisional registration results in rights becoming 'registered' within the meaning of s 1(2)(b): see *Lord Dynevor v Richardson* [1995] Ch 173, [1995] 1 All ER 109.

11 le the date of expiry of the second period for lodging objections: see the Commons Registration Act 1965 s 5(2) (ss 5, 16 repealed in relation to the pilot areas in England by virtue of SI 2008/1960; prospectively repealed in relation to the whole of England and Wales by the Commons Act 2006 Sch 6 Pt 1, as from a day to be appointed under s 56(1); at the date at which this title states the law, no such day had been appointed); and the Commons Registration (Objections and Maps) Regulations 1968, SI 1968/989, reg 4(1), (2) (amended by SI 1970/384; SI 2007/540). But see *Smith v East Sussex County Council* (1977) 76 LGR 332 (where an objection could not be raised within the period because a local authority's public notice was misleading, the end of the period was not a bar). Amending Acts of local application have been passed to enable the reconstruction of the registers where there has been a failure to comply with the procedural requirements or where the records were destroyed by fire (see eg the Commons Registration (East Sussex) Act 1994).

An objection to the registration of any land as common land or a town or village green was to be treated for the purposes of the Commons Registration Act 1965 as being an objection to any registration (whenever made) of any rights over the land: s 5(7) (repealed and prospectively repealed). An objection to the registration of any land as common land necessarily puts in issue the entire registration, since it is the act of registration which is objected to: *Re West Anstey Common, North Devon* [1985] Ch 329, [1985] 1 All ER 618, CA.

As to the standing of a local authority in which the land affected by the registration is not vested see *Thorne RDC v Bunting* [1972] Ch 470, [1972] 1 All ER 439.

For the purposes of the Prescription Act 1932 any objection under the Commons Registration Act 1965 to the registration of a right of common was deemed to be such a suit or action as is referred to in the Prescription Act 1932 s 4: Commons Registration Act 1965 s 16(2) (repealed and prospectively repealed); and see PARA 473.

12 Commons Registration Act 1965 s 7(1) (s 7 repealed in relation to the pilot areas in England by virtue of SI 2008/1960; prospectively repealed in relation to the whole of England and Wales by the Commons Act 2006 Sch 6 Pt 1, as from a day to be appointed under s 56(1); at the date at which this title states the law, no such day had been appointed).

13 See the Commons Registration Act 1965 s 5(6) (repealed and prospectively repealed: see note 11). As to the Commons Commissioners see PARA 425. Two periods, between them covering all registrations made under s 4, were prescribed for the referral of disputes to the Commons Commissioner: the first, relating to 'first period' registrations (ie registrations made before 1 July 1968), was a period beginning with the date of the objection and ending on 17 December 1971 (Commons Commissioners Regulations 1971, SI 1971/1727, reg 6); the second, relating to 'second period' registrations (ie registrations made after 30 June 1968) and to certain exceptions to the first period registrations, was a period beginning with the date of the objection and ending on 31 July 1973 (Commons Registration (Second Period References) Regulations 1973, SI 1973/815, reg 2). See, however, the text and notes 15-16.

14 See the Commons Registration Act 1965 s 6(1); and PARA 506. As to the duties of the registration authority on the confirmation or refusal to confirm a registration see s 6(2), (3); and PARA 511. If some event occurs after the date of registration which extinguishes the right of common, the Commons Commissioner must consider the position at the date of the hearing rather than at the date of registration: *Re Merthyr Mawr Common, Knight v Ogwr Borough Council* [1989] 3 All ER 451, [1989] 1 WLR 1014.

15 Ie a court order made (1) after 30 September 1970, if provisional registration took place after 1 January 1967 and before 1 July 1968; or (2) after 31 July 1972, if provisional registration took place after 30 June 1968 and before 1 August 1970: Commons Registration (Objections and Maps) Regulations 1968, SI 1968/989, reg 4(5) (added by SI 2007/540)

16 See the Commons Registration (Objections and Maps) Regulations 1968, SI 1968/989, reg 4(4), (5) (added by SI 2007/540).

17 See the Commons Registration Act 1965 s 10 (repealed in relation to the pilot areas in England by virtue of SI 2008/1960; prospectively repealed in relation to the whole of England and Wales by the Commons Act 2006 Sch 6 Pt 1, as from a day to be appointed under s 56(1); at the date at which this title states the law, no such day had been appointed); and see also *R v Norfolk County Council, ex p Perry* (1996) 74 P & CR 1. As to the effect of registration beyond being proof of itself the Commons Registration Act 1965 is, however, otherwise silent: the only matter registered is that the land is common land and no indication is given as to the rights arising from the registration: see *New Windsor Corpn v Mellor* [1975] Ch 380 at 392, [1975] 3 All ER 44 at 51, CA, obiter per Lord Denning MR; but see now *Oxfordshire County Council v Oxford City Council* [2006] UKHL 25, [2006] 2 AC 674, [2006] 4 All ER 817 (a case on town and village greens). See also the discussion on this point in *R (on the application of Laing Homes Ltd) v Buckinghamshire County Council* [2003] EWHC 1578 (Admin) at [40]-[49], [2004] 1 P & CR 573 at [40]-[49] per Sullivan J; and see *President and Scholars of Corpus Christi College, Oxford v Gloucestershire County Council* [1983] QB 360, [1982] 3 All ER 995, CA (successful objection to rights registration but no objection to land registration; land deemed 'waste of the manor' although evidence that it never had been). 'Registration' includes an entry in the register made in pursuance of the Commons Registration Act 1965 s 13 (see PARA 516): s 22(1) (repealed and prospectively repealed: see note 4). Registration is not, however, conclusive for the purpose of deciding whether any land forms part of a highway: s 21(2) (prospectively repealed by the Commons Act 2006 Sch 6 Pt 1, as from a day to be appointed under s 56(1); at the date at which this title states the law, no such day had been appointed). See *Crown Estates Comrs v Dorset County Council* [1990] Ch 297, [1990] 1 All ER 19. Where a person who has provisionally registered rights over land wishes to protect those rights by applying to the court for an injunction or other relief he must show at least prima facie evidence of the existence of such rights: *Cooke v Amey Gravel Co Ltd* [1972] 3 All ER 579, [1972] 1 WLR 1310.

18 *Re Merthyr Mawr Common, Knight v Ogwr Borough Council* [1989] 3 All ER 451, [1989] 1 WLR 1014, following dictum of Goff J in *Central Electricity Generating Board v Clwyd County Council* [1976] 1 All ER 251 at 256, [1976] 1 WLR 151 at 157.

19 le the Law of Property Act 1925 s 193: see PARA 581.

20 le the Law of Property Act 1925 s 194 (repealed in relation to England, and prospectively repealed in relation to Wales, by the Commons Act 2006 Sch 6 Pt 2; and by virtue of SI 2007/2584).

21 Commons Registration Act 1965 s 21(1) (prospectively repealed by the Commons Act 2006 Sch 6 Pt 1, as from a day to be appointed under s 56(1); at the date at which this title states the law, no such day had been appointed).

22 See the Commons Act 2006 Pt 1 (ss 1-25) (not fully in force); and PARAS 467-469, 521 et seq. The 2006 Act and any provision made under it binds the Crown: s 60(1). Section 60 does not impose criminal liability on the Crown in relation to an offence under s 34(1) (see PARA 607) (s 60(2)); but this does not affect the criminal liability of persons in the service of the Crown (s 60(3)).

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509. Exemptions from registration.

The Secretary of State¹ was empowered by order to specify certain land² which would be exempt from the registration requirements³. The type of land which could be exempted was land regulated:

- 141 (1) by a scheme under the Commons Act 1899⁴ or the Metropolitan Commons Acts 1866 to 1898⁵; or
- 142 (2) under a local Act or an Act confirming a provisional order made under the Commons Act 1876⁶,

where no rights of common⁷ had been exercised over the land for at least 30 years and the owner of the land⁸ was known⁹. The Secretary of State could make an exemption order only where an application for such an order was made to him before 1 October 1966¹⁰. Such exemption orders, being local in nature, are not recorded in this work¹¹.

The registration requirements were also not applicable to land in the New Forest or Epping Forest, and are not to be taken to have been applicable to land in the Forest of Dean¹². Land in those forests continues to be exempted from the registration requirements by the Commons Act 2006¹³, but land exempted by order under the Commons Registration Act 1965, as described above¹⁴, is not excluded from the operation of Part 1 of the Commons Act 2006¹⁵ and may qualify for registration under the provisions of that Act allowing for the registration of common land not previously registered¹⁶.

1 As to the Secretary of State see PARA 423. Functions under the Commons Registration Act 1965 were transferred, in relation to Wales, to the National Assembly for Wales in 1999 and are now exercisable by the Welsh Ministers (see PARA 423) but the functions set out in the text were no longer capable of being exercised at the date of that transfer: see the text and note 10.

2 As to the meaning of 'land' see PARA 403 note 1.

3 Commons Registration Act 1965 s 11(1) (s 11 repealed in relation to the pilot areas in England by virtue of SI 2008/1960; prospectively repealed, in relation to the whole of England and Wales, by the Commons Act 2006 Sch 6 Pt 1, as from a day to be appointed under s 56(1); at the date at which this volume states the law, no such day had been appointed). As to the registration requirements see PARA 508; and as to the pilot areas in England see PARA 467 text and notes 29-30.

4 As to schemes under the Commons Act 1899 see PARAS 427, 590-598.

5 Commons Registration Act 1965 s 11(3)(a) (repealed and prospectively repealed: see note 3). As to the Metropolitan Commons Acts 1866 to 1898 see **LONDON GOVERNMENT**.

6 Commons Registration Act 1965 s 11(3)(a).

7 As to the meaning of 'right of common' see PARA 405.

8 As to the ownership of land for the purposes of the Commons Registration Act 1965 see PARA 508 note 4.

9 Commons Registration Act 1965 s 11(3)(b) (repealed and prospectively repealed: see note 3).

10 Commons Registration Act 1965 s 11(2) (repealed and prospectively repealed: see note 3); Commons Registration (Exempted Land) Regulations 1965, SI 1965/2001, reg 3. Before dealing with any application under the Commons Registration Act 1965 s 11, the Secretary of State was required to send copies of it to the registration authority and to such other local authorities as might be prescribed, and was required to inform

those authorities whether he had granted or refused the application: s 11(4) (repealed and prospectively repealed). The relevant authorities were then required to take prescribed steps for informing the public of the application and its grant or refusal: s 11(4) (repealed and prospectively repealed). 'Prescribed' means prescribed by regulations under the Commons Registration Act 1965: s 22(1) (s 22 prospectively repealed by the Commons Act 2006 Sch 6 Pt 1, as from a day to be appointed under s 56(1); at the date at which this volume states the law, no such day had been appointed). The Commons Registration (Exempted Land) Regulations 1965, SI 1965/2001, regs 3-5, Schedule prescribe the forms of application and the authorities concerned, and make provision for the information to be given to the public. As to the registration authorities see PARA 507.

11 For a list of the commons exempted by such orders see the Explanatory Notes to the Commons Act 2006 Annex B.

12 Commons Registration Act 1965 s 11(1) (repealed and prospectively repealed: see note 3). As to the New Forest, Epping Forest and the Forest of Dean see PARA 411 note 1. Where any question arose as to whether any land was part of the exempted forests for these purposes it had to be referred to and decided by the Secretary of State: s 11(5) (repealed and prospectively repealed: see note 3).

13 See the Commons Act 2006 s 5(2)-(4); and PARA 411.

14 See the text and notes 1-11.

15 In the Commons Act 2006 Pt 1 (ss 1-25) (not fully in force).

16 See the Commons Act 2006 Sch 2 para 2 (not fully in force); and PARA 535.

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(2) REGISTRATION UNDER THE

510. Form of the register.

Every registration authority¹ must maintain:

- 143 (1) a register of common land²; and
- 144 (2) a register of town or village greens³.

Every such register must be open to inspection by the public at all reasonable times⁴, and each must consist of:

- 145 (a) a general part⁵;
- 146 (b) a register map⁶;
- 147 (c) as many register units as there are registrations of land⁷ in the register⁸; and
- 148 (d) such supplemental maps, if any, as may be necessary⁹.

The above provisions do not apply in relation to the pilot areas in England¹⁰. Registration in those areas is governed by Part 1 of the Commons Act 2006¹¹.

1 As to the registration authorities see PARA 507.

2 Commons Registration Act 1965 s 3(1)(a) (s 3 repealed in relation to the pilot areas in England by virtue of SI 2008/1960; prospectively repealed, in relation to the whole of England and Wales, by the Commons Act 2006 Sch 6 Pt 1, as from a day to be appointed under s 56(1); at the date at which this volume states the law, no such day had been appointed). As to the pilot areas in England see PARA 467 text and notes 29-30. As to the meaning of 'common land' for these purposes see PARA 407.

3 Commons Registration Act 1965 s 3(1)(b) (repealed and prospectively repealed: see note 2). As to land which may be registered in England and Wales as a town or village green see now the Commons Act 2006 s 15; and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 541.

4 Commons Registration Act 1965 s 3(2) (repealed and prospectively repealed: see note 2).

5 Commons Registration (General) Regulations 1966, SI 1966/1471, reg 4(1)(a). The general part of each register is to contain:

- 3 (1) particulars of any agreement under the Commons Registration Act 1965 s 2 to which the registration authority was a party (see PARA 507) (Commons Registration (General) Regulations 1966, SI 1966/1471, reg 4(2)(a));
- 4 (2) particulars of any land situated in the area of the registration authority to which, by virtue of the Commons Registration Act 1965 s 11 (see PARA 509) or of an order made thereunder, the registration provisions do not apply (Commons Registration (General) Regulations 1966, SI 1966/1471, reg 4(2)(b));
- 5 (3) particulars of any transfer, to or from the registration authority, of responsibility for maintaining any register or register unit, otherwise than under the Commons Registration Act 1965 s 2 (see PARA 507) (Commons Registration (General) Regulations 1966, SI 1966/1471, reg 4(2)(c)); and

- 6 (4) any such other information as may by any regulations made under the 1965 Act be required or authorised to be entered in the register (Commons Registration (General) Regulations 1966, SI 1966/1471, reg 4(2)(d)).

The general part of the register must be in Form 1 in Sch 1: reg 4(2). See also reg 4(3); and Sch 2 Pt I Model Entries 1-3.

6 Commons Registration (General) Regulations 1966, SI 1966/1471, reg 4(1)(b). The register map to be prepared under the Commons Registration (General) Regulations 1966, SI 1966/1471, is a provisional register map and is prepared in accordance with Pt III (regs 16-20): reg 4(4).

7 As to the meaning of 'land' see PARA 403 note 1.

8 Commons Registration (General) Regulations 1966, SI 1966/1471, reg 4(1)(c). The register units each consist of three sections, called the land section, the rights section and the ownership section. The land section of each register unit contains the registrations of the common land, or of the town or village green, as the case may be, comprised in it, together with a reference to the register map, and such other information as may by any regulations made under the Commons Registration Act 1965 be required or authorised to be entered therein, and must be in Form 2 in the Commons Registration (General) Regulations 1966, SI 1966/1471, Sch 1: reg 4(6). The rights section of each register unit contains the registrations of the rights of common registered as exercisable over the land comprised in the land section of the register unit, or any part of it, particulars of the persons on whose application the rights were registered and the capacities in which they applied, descriptions of the land, if any, to which the rights were attached, and such other information as may by any regulations made under the 1965 Act be required or authorised to be entered in it, and must be in Form 3 in the Commons Registration (General) Regulations 1966, SI 1966/1471, Sch 1: reg 4(7). The ownership section of each unit contains the registration of every person registered as owner of any part of the land comprised in the register unit, and such other information as may by any regulations made under the 1965 Act be required or authorised to be entered therein, and must be in Form 4 in the Commons Registration (General) Regulations 1966, SI 1966/1471, Sch 1: reg 4(8). As to the ownership of land for these purposes see PARA 508 note 4.

As to the register units see reg 10, which prescribes model entries, and provides, inter alia, that a distinguishing number must be allotted to each register unit from a separate series for each register, and that every register unit number for the register of common land must bear the prefix CL, and every such number for the register of greens must bear the prefix VG: reg 10(5).

9 Commons Registration (General) Regulations 1966, SI 1966/1471, reg 4(1)(d). A supplemental map is a map prepared where a right of common attached to any land falls to be registered, and that land or any part of it is described in the application for provisional registration by means of a plan: regs 2(2), 20(1).

10 As to the repeal of the Commons Registration Act 1965 s 3 in relation to the pilot areas see notes 2-4.

11 As to registration under the Commons Act 2006 Pt 1 (ss 1-25) (not fully in force) see PARA 521 et seq.

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511. Finality of registration or cancellation.

Registration was in the first place provisional only¹. Where a registration has become final² the registration authority³ must indicate that fact, in the prescribed manner, in the register⁴. On being informed in the prescribed manner that a registration has become final (with or without modifications), or has become void⁵, the authority must indicate that fact in the prescribed manner in the register and, if it has become void, cancel the registration⁶.

Where the registration of any land⁷ as common land⁸ or as a town or village green⁹ is cancelled¹⁰, the registration authority must also cancel the registration under the Commons Registration Act 1965 of any person as its owner¹¹.

The above provisions do not apply in relation to the pilot areas in England¹². Registration in those areas is governed by Part 1 of the Commons Act 2006¹³.

1 See the Commons Registration Act 1965 s 4(5); and PARA 508.

2 Ie by virtue of the Commons Registration Act 1965 s 7(1): see PARA 508.

3 As to the registration authorities see PARA 507.

4 Commons Registration Act 1965 s 7(2) (repealed in relation to the pilot areas in England by virtue of SI 2008/1960; prospectively repealed, in relation to the whole of England and Wales, by the Commons Act 2006 Sch 6 Pt 1, as from a day to be appointed under s 56(1); at the date at which this volume states the law, no such day had been appointed). As to the pilot areas in England see PARA 467 text and notes 29-30. 'The register' is the register of common land and the register of town or village greens maintained under s 3(1): see PARA 510. 'Prescribed' means prescribed by regulations under the Commons Registration Act 1965: s 22(1) (prospectively repealed by the Commons Act 2006 Sch 6 Pt 1, as from a day to be appointed under s 56(1); at the date at which this volume states the law, no such day had been appointed). The method of indicating the fact on the register is prescribed by the Commons Registration (Finality of Undisputed Registrations) Regulations 1970, SI 1970/1371.

5 Ie under the Commons Registration Act 1965 s 6(1): see PARA 508.

6 Commons Registration Act 1965 s 6(2) (s 6 repealed in relation to the pilot areas in England by virtue of SI 2008/1960; prospectively repealed, in relation to the whole of England and Wales, by the Commons Act 2006 Sch 6 Pt 1, as from a day to be appointed under s 56(1); at the date at which this volume states the law, no such day had been appointed). As to disputed registrations becoming final under s 6 see PARA 508. The manner of informing the registration authority that a registration has become final or void under s 6 is prescribed by the Commons Commissioners Regulations 1971, SI 1971/1727, reg 32. The method of indicating on the register that a registration has become final or void under the Commons Registration Act 1965 s 6 is prescribed by the Commons Registration (Disposal of Disputed Registrations) Regulations 1972, SI 1972/437. Under those regulations the authority must make the entry in accordance with prescribed model entries as appropriate, with such modifications, if any, as the case may require, and must make any necessary amendment to the register map and any supplemental map: see Schedule Pt I (amended by SI 1993/1771). The regulations also make provision: (1) for the transfer of entries where any land has been provisionally registered as both common land and as a town or village green, and one of the registrations has become void (see the Commons Registration (Disposal of Disputed Registrations) Regulations 1972, SI 1972/437, reg 4); (2) for the noting of rights over land comprised in another register unit (see reg 5); and (3) for the indication of area measurements and foreshore boundaries (see regs 6, 7).

7 As to the meaning of 'land' see PARA 403 note 1.

8 As to the meaning of 'common land' for these purposes see PARA 407.

9 As to the meaning of 'town or village green' see PARA 401 note 1. As to land which may be registered in England and Wales as a town or village green see now the Commons Act 2006 s 15; and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 541.

10 le under the Commons Registration Act 1965 ss 5(5), (6): see PARA 508.

11 Commons Registration Act 1965 s 6(3) (repealed and prospectively repealed: see note 6). As to the ownership of land for these purposes see PARA 508 note 4. See *Lord Dynevor v Richardson* [1995] Ch 173, [1995] 1 All ER 109 (rights of common are 'registered' whether the registration is provisional or final).

The effect of the Commons Registration Act 1965 s 10 (see PARA 508) is to make the register conclusive as regards the status of the land (on the land register) as common and the rights (on the rights register) but it deliberately does not confirm the ownership (on the ownership register kept under the 1965 Act). Applicants for entry on the ownership register did not have to deduce title and the registering authorities were not competent to make decisions about title. The Commons Commissioner had to deal with disputed applications for entry on the ownership register and also awarded unclaimed land and for that purpose the commissioner (who was an experienced barrister) had to consider such matters, but he was not a judge and his views are not binding as to matters of title.

12 As to the repeal of the Commons Registration Act 1965 ss 6, 7 in relation to the pilot areas see notes 4, 6, 11. For transitional provisions see the Commons Act 2006 (Commencement No 4 and Savings) (England) Order 2008, SI 2008/1960, reg 3(4), (5).

13 As to registration under the Commons Act 2006 Pt 1 (ss 1-25) (not fully in force) see PARA 521 et seq.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/3. REGISTRATION OF COMMON LAND/(2) REGISTRATION UNDER THE COMMONS REGISTRATION ACT 1965/512. Subsequent registration under the Land Registration Acts.

512. Subsequent registration under the Land Registration Acts.

If, after the ownership¹ of any land² has been registered³, the registration authority⁴ is notified by the Chief Land Registrar that the land has been subsequently registered in the register of title kept by him⁵, the authority must delete the registration in the register⁶ and indicate in the register in the prescribed manner that the land has been otherwise registered⁷.

At the date at which this volume states the law, the above provisions did not apply in relation to the pilot areas in England⁸. Registration in those areas was governed by Part 1 of the Commons Act 2006⁹.

1 As to the ownership of land for these purposes see PARA 508 note 4.

2 As to the meaning of 'land' see PARA 403 note 1.

3 Ie under the Commons Registration Act 1965: see PARA 508.

4 As to the registration authorities see PARA 507.

5 As to the meaning of 'the register of title' see PARA 508 note 4. References in the Commons Registration Act 1965 to land registered in the register of title are references to land the fee simple of which is so registered: Commons Registration Act 1965 s 22(2) (amended by the Land Registration Act 2002 Sch 11 para 7(1), (6); prospectively repealed by the Commons Act 2006 Sch 6 Pt 1, as from a day to be appointed under s 56(1); at the date at which this volume states the law, no such day had been appointed). As to registration of title see generally **LAND REGISTRATION**.

6 Ie the register of common land and the register of town or village greens maintained under the Commons Registration Act 1965 s 3(1): see PARA 510.

7 Commons Registration Act 1965 s 12(b) (amended by the Land Registration Act 2002 Sch 11 para 7(1), (4); repealed in relation to the pilot areas in England by virtue of SI 2008/1960; prospectively repealed, in relation to the whole of England and Wales, by the Commons Act 2006 Sch 6 Pt 1, as from a day to be appointed under s 56(1); at the date at which this volume states the law, no such day had been appointed). As to the pilot areas in England see PARA 467 text and notes 29-30. Provision is made for the noting of these alterations to the registration status of land: see the Commons Registration (General) Regulations 1966, SI 1966/1471, reg 21.

8 As to the repeal of the Commons Registration Act 1965 s 12(b) in relation to the pilot areas see note 7.

9 As to registration under the Commons Act 2006 Pt 1 (ss 1-25) (not fully in force) see PARA 521 et seq.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/3. REGISTRATION OF COMMON LAND/(2) REGISTRATION UNDER THE COMMONS REGISTRATION ACT 1965/513. Matters affecting the public.

513. Matters affecting the public.

The following matters affecting registered common land¹ may be noted by the registration authority² in the land section of the register maintained under the Commons Registration Act 1965³ whether an application in that behalf has been made or not⁴:

- 149 (1) schemes under the Commons Act 1899⁵ or the Metropolitan Commons Acts 1866 to 1898⁶;
- 150 (2) local Acts regulating the land⁷;
- 151 (3) Acts confirming provisional orders made under the Commons Act 1876⁸; and
- 152 (4) limitations and conditions imposed⁹ in respect of common land to which the public has access¹⁰.

Where a registration authority has not noted any such matter, it must do so upon application being made to it¹¹. A registration authority may cancel an entry relating to such a matter if it is satisfied on reasonable grounds that the matter to which the entry relates is no longer subsisting¹².

In relation to the pilot areas in England¹³, the register maintained as described above continues to be maintained under Part 1 of the Commons Act 2006¹⁴ and existing register entries continue to be valid¹⁵ but the form and content of the register is prescribed by regulations made under that Act¹⁶.

1 le land registered under the Commons Registration Act 1965: see PARA 508. As to the meaning of 'common land' for these purposes see PARA 407; and as to the meaning of 'land' see PARA 403 note 1.

2 As to the registration authorities see PARA 507.

3 le the register of common land and the register of town or village greens maintained under the Commons Registration Act 1965 s 3(1). As to the register, and the land section thereof, see PARA 510.

4 Commons Registration (General) Regulations 1966, SI 1966/1471, reg 22(1).

5 le under the Commons Act 1899 Pt I (ss 1-15): see PARAS 427, 590-598.

6 Commons Registration (General) Regulations 1966, SI 1966/1471, reg 22(2)(a). As to the Metropolitan Commons Acts 1866 to 1898 see **LONDON GOVERNMENT**.

7 Commons Registration (General) Regulations 1966, SI 1966/1471, reg 22(2)(b).

8 Commons Registration (General) Regulations 1966, SI 1966/1471, reg 22(2)(c).

9 le imposed under the Law of Property Act 1925 s 193(1) proviso (b): see PARA 581.

10 Commons Registration (General) Regulations 1966, SI 1966/1471, reg 22(2)(d). As to the statutory framework relating to the imposition of such limitations and conditions see PARAS 581, 585.

11 Commons Registration (General) Regulations 1966, SI 1966/1471, reg 22(1). Applications must be in writing, and may be made by any local authority in whose area any part of the land lies, by any person charged by law with the management or regulation of the land, or (in the case of the limitations and conditions referred to in head (4) in the text) by the owner of any part of the land, by any person appearing from the register to be interested in a right of common registered as exercisable thereover, or, where any part of the land, or any such right, belongs to an ecclesiastical benefice of the Church of England which is vacant, by the Church

Commissioners: reg 22(3). Any such note entered in a register must be in accordance with Model Entry 13 or 14 in Sch 2 Pt I, and, where an entry is made pursuant to an application, the registration authority must send the applicant a copy of the entry: reg 22(4). As to the Church Commissioners see **ECCLESIASTICAL LAW**.

- 12 Commons Registration (General) Regulations 1966, SI 1966/1471, reg 25.
- 13 As to the pilot areas in England see PARA 467 text and notes 29-30.
- 14 Ie under the Commons Act 2006 Pt 1 (ss 1-25) (not fully in force): see PARAS 526-527.
- 15 See PARA 528.
- 16 See PARA 527.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/3. REGISTRATION OF COMMON LAND/(2) REGISTRATION UNDER THE COMMONS REGISTRATION ACT 1965/514. Charitable interests.

514. Charitable interests.

Where land registered under the Commons Registration Act 1965¹ is held for charitable purposes², the registration authority³ must, on the application of the owner⁴ or the charity trustees⁵, enter a note to that effect in the land section of the register maintained under the Commons Registration Act 1965⁶ and must send the applicant a copy of the entry⁷. A registration authority may cancel an entry relating to such purposes if it is satisfied on reasonable grounds that the matter to which the entry relates is no longer subsisting⁸.

In relation to the pilot areas in England⁹, the register maintained as described above continues to be maintained under Part 1 of the Commons Act 2006¹⁰ and existing register entries continue to be valid¹¹ but the form and content of the register is prescribed by regulations made under that Act¹².

1 As to registration under the Commons Registration Act 1965 see PARA 508; and as to the meaning of 'land' see PARA 403 note 1.

2 As to the meaning of 'charitable purposes' see, by virtue of the Commons Registration (General) Regulations 1966, SI 1966/1471, reg 2(2) and the Interpretation Act 1978 s 17(2), the Charities Act 1993 s 97(1); the Charities Act 2006 s 2; and **CHARITIES** vol 8 (2010) PARA 2.

3 As to the registration authorities see PARA 507.

4 As to the ownership of land for these purposes see PARA 508 note 4.

5 As to the meaning of 'charity' see, by virtue of the Commons Registration (General) Regulations 1966, SI 1966/1471, reg 2(2) and the Interpretation Act 1978 s 17(2), the Charities Act 1993 s 96(1); the Charities Act 2006 s 1; and **CHARITIES** vol 8 (2010) PARA 1. 'Charity trustees' means the persons having the general control and management of the administration of a charity: see, by virtue of the Commons Registration (General) Regulations 1966, SI 1966/1471, reg 2(2), the Charities Act 1993 s 97(1); the Charities Act 2006 s 78(2)(c); and **CHARITIES** vol 8 (2010) PARA 1.

6 Ie the register of common land and the register of town or village greens maintained under the Commons Registration Act 1965 s 3(1). As to the register, and the land section thereof, see PARA 510.

7 Commons Registration (General) Regulations 1966, SI 1966/1471, reg 23. The entry must be in accordance with Sch 2 Pt I, Model Entry 15: reg 23.

8 Commons Registration (General) Regulations 1966, SI 1966/1471, reg 25.

9 As to the pilot areas in England see PARA 467 text and notes 29-30.

10 Ie under the Commons Act 2006 Pt 1 (ss 1-25) (not fully in force): see PARAS 526-527.

11 See PARA 528.

12 See PARA 527.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/3. REGISTRATION OF COMMON LAND/(2) REGISTRATION UNDER THE COMMONS REGISTRATION ACT 1965/515. Private rights and interests.

515. Private rights and interests.

A registration authority¹ must, upon application being made to it², enter a note in the land section of the register maintained under the Commons Registration Act 1965³ of the existence, in relation to any registered common land⁴, of a claim to any of the following rights and interests⁵:

- 153 (1) easements⁶;
- 154 (2) profits à prendre other than rights of common⁷;
- 155 (3) franchises⁸;
- 156 (4) rights and interests of the lord of the manor (in that capacity), other than the ownership of the land⁹;
- 157 (5) the ownership of minerals and all rights incident thereto (where the ownership of any minerals in or under the land is severed from the ownership of the surface)¹⁰;
- 158 (6) rights of the lessee or licensee under any mineral lease or licence¹¹; and
- 159 (7) rights acquired by statutory undertakers for the purpose of their undertakings¹².

The authority is not obliged to enter a note of any right or interest which appears to the authority to be of a trivial, obvious or transitory nature, or to make any such entry as would be likely to cause confusion or inconvenience or would be unlikely to add substantially to the information obtainable from an inspection of the land¹³. An authority may cancel an entry if it is satisfied on reasonable grounds that the matter to which the entry relates is no longer subsisting¹⁴.

In relation to the pilot areas in England¹⁵, the register maintained as described above continues to be maintained under Part 1 of the Commons Act 2006¹⁶ and existing register entries continue to be valid¹⁷ but the form and content of the register is prescribed by regulations made under that Act¹⁸.

1 As to the registration authorities see PARA 507.

2 Every application must be as set out in the Commons Registration (General) Regulations 1966, SI 1966/1471, Sch 1 Form 16, and be made by the person claiming to be entitled to the right or interest, or, where the right belongs to an ecclesiastical benefice of the Church of England which is vacant, by the Church Commissioners: reg 24(3). As to the Church Commissioners see **ECCLESIASTICAL LAW**. Where a registration authority accepts an application, it must make a note in the register in accordance with the appropriate prescribed Model Entry (see Sch 2 Pt I), and must send written notice to the applicant of the making of the note together with a copy of the note as entered (reg 24(4)). Where a registration authority rejects an application it must so inform the applicant in writing, giving the reasons for the rejection: reg 24(6).

3 Ie the register of common land and the register of town or village greens maintained under the Commons Registration Act 1965 s 3(1). As to the register, and the land section thereof, see PARA 510.

4 Ie land registered under the Commons Registration Act 1965: see PARA 508. As to the meaning of 'common land' for these purposes see PARA 407; and as to the meaning of 'land' see PARA 403 note 1.

5 Commons Registration (General) Regulations 1966, SI 1966/1471, reg 24(1).

6 Commons Registration (General) Regulations 1966, SI 1966/1471, reg 24(2)(a). As to easements see **EASEMENTS AND PROFITS A PRENDRE** vol 16(2) (Reissue) PARA 1 et seq.

7 Commons Registration (General) Regulations 1966, SI 1966/1471, reg 24(2)(b). As to profits à prendre see **EASEMENTS AND PROFITS A PRENDRE** vol 16(2) (Reissue) PARA 254 et seq.

8 Commons Registration (General) Regulations 1966, SI 1966/1471, reg 24(2)(c).

9 Commons Registration (General) Regulations 1966, SI 1966/1471, reg 24(2)(d). As to the ownership of land for these purposes see PARA 508 note 4.

10 Commons Registration (General) Regulations 1966, SI 1966/1471, reg 24(2)(e).

11 Commons Registration (General) Regulations 1966, SI 1966/1471, reg 24(2)(f).

12 Commons Registration (General) Regulations 1966, SI 1966/1471, reg 24(2)(g).

13 Commons Registration (General) Regulations 1966, SI 1966/1471, reg 24(1).

14 Commons Registration (General) Regulations 1966, SI 1966/1471, reg 25.

15 As to the pilot areas in England see PARA 467 text and notes 29-30.

16 Ie under the Commons Act 2006 Pt 1 (ss 1-25) (not fully in force): see PARAS 526-527.

17 See PARA 528.

18 See PARA 527.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/3. REGISTRATION OF COMMON LAND/(2) REGISTRATION UNDER THE COMMONS REGISTRATION ACT 1965/516. Amendment where the nature of land or rights changes.

516. Amendment where the nature of land or rights changes.

The registers maintained under the Commons Registration Act 1965¹ may be amended² where any registered rights³ are apportioned, extinguished⁴ or released, or are varied or transferred in prescribed circumstances⁵.

Where the registration authority⁶ has accepted an application for an amendment of the register in consequence of a change in the status of registered rights⁷, and has made the necessary amendments, it must give written notice thereof, with particulars of the amendment, to every concerned authority, to the applicant, and to every person served with notice of the application⁸. Where it has rejected such an application, it must give written notice of the rejection, giving the reasons for the rejection⁹.

If the register has been amended in accordance with these provisions and it appears to the High Court that no amendment or a different amendment ought to have been made and that the error cannot otherwise be corrected¹⁰, the court may order the register to be amended if it deems it just to do so¹¹.

Subject to transitional provisions¹², the procedure for amendment of the registers described above does not apply in relation to the pilot areas in England¹³. The registers maintained under the 1965 Act continue to be maintained in those areas under Part 1 of the Commons Act 2006¹⁴ but provision for their amendment is made by the 2006 Act¹⁵.

The Commons Registration Act 1965 also contained provisions for the amendment of the registers where any registered land¹⁶ either ceased to be, or became, common land¹⁷ or a town or village green¹⁸. Those provisions have been repealed in relation to the whole of England and Wales¹⁹ but, at the date at which this volume states the law, those provisions, and the regulations made under them, continued to have effect for certain purposes except in relation to the pilot areas in England by virtue of the transitional provisions made on the coming into force of those repeals²⁰.

1 The register of common land and the register of town or village greens maintained under the Commons Registration Act 1965 s 3(1): see PARA 510.

2 An application for an amendment of the register under these provisions must be contrasted with the lodging of an objection to the registration of the land (the time for doing which has now expired: see PARA 508). An application for amendment relates to events which have taken place since the provisional registration, while an objection related to the state of affairs when the registration was made: see *President and Scholars of Corpus Christi College, Oxford v Gloucestershire County Council* [1983] QB 360, [1982] 3 All ER 995, CA (failure to object to entry in register; not possible to amend register subsequently); *R v Norfolk County Council, ex p Perry* (1996) 74 P & CR 1, CA. However, see also *G & K Ladenbau (UK) Ltd v Crawley & de Reya* [1978] 1 All ER 682, [1978] 1 WLR 266 (local authority amended the register after a deed was executed by the successors in title to the lord of the manor stating that for the avoidance of doubt they released all the estate, interest and other rights which they might have in the land). Following the decision in *Hampshire County Council v Milburn* [1991] 1 AC 325, [1990] 2 All ER 257, HL, however, it seems that such a release would not now be effective (see PARA 506 note 21) although procedures under the Commons Act 2006 Sch 2 (not fully in force) might be of assistance (see PARA 539).

It was generally considered that a person who acquired both the soil of the common and all common rights could apply to the registration authority for removal of the land and rights from the register (provided that the land was not waste of the manor), but it has since been suggested that, following the decision in *President and Scholars of Corpus Christi College, Oxford v Gloucestershire County Council* [1983] QB 360, [1982] 3 All ER 995, CA, this may no longer be so. Severance of the lordship of the manor from the waste will not enable the land to be de-registered under these provisions: see *Hampshire County Council v Milburn* [1991] 1 AC 325, [1990] 2 All

ER 257, HL; *Lewis v Mid Glamorgan County Council* [1995] 1 All ER 760, [1995] 1 WLR 313, HL. As to the amendment of the register in the case of land subsequently becoming common land or a green see the text and notes 18-20.

3 As to the registration of private rights and interests see PARA 515.

4 Note that under the Commons Act 2006 s 13(3) (not fully in force) a registered right of common cannot be extinguished by operation of common law: see PARA 493.

5 Commons Registration Act 1965 s 13(c) (repealed in relation to the pilot areas in England by virtue of SI 2008/1960; prospectively repealed, in relation to the whole of England and Wales, by the Commons Act 2006 Sch 6 Pt 1, as from a day to be appointed under s 56(1); at the date at which this volume states the law, no such day had been appointed). As to the pilot areas in England see PARA 467 text and notes 29-30. Where a registered right of common has been apportioned, varied, extinguished or released, or, having become a right in gross, has been transferred, application for an amendment of the register may be made by any person having an interest under the apportionment, variation, extinguishment, release or transfer: Commons Registration (General) Regulations 1966, SI 1966/1471, reg 29(1), (2)(a) (reg 29(2) substituted by SI 1968/658). For the purposes of the Commons Registration (General) Regulations 1966, SI 1966/1471, reg 29, a 'person having an interest' includes (without prejudice to the generality of the expression): (1) in the case of an apportionment, variation or transfer, any person who, at the date of the application under reg 29, would have been entitled (whether or not by virtue of any provision of the regulations) to apply under the Commons Registration Act 1965 s 4 (see PARA 508) for the registration of the right as apportioned, varied or transferred, if at that date an application could have been made; (2) in the case of an extinguishment or release, any person who, at the date of the application under the Commons Registration (General) Regulations 1966, SI 1966/1471, reg 29, would have been entitled (whether or not by virtue of any provision of the regulations) to apply under the Commons Registration Act 1965 s 4 for the registration of a claim to the ownership of any part of the land over which the right extinguished or released was formerly exercisable, if at that date such an application could have been made: Commons Registration (General) Regulations 1966, SI 1966/1471, reg 29(2)(b) (as so substituted). Every application must be in the prescribed form (see Sch 1 Form 19), must be signed by or on behalf of every applicant who is an individual, and by the secretary or other duly authorised officer of every applicant which is a body corporate, and must be supported by a statutory declaration made by every person who has signed the application, and by such further evidence, if any, as, after considering the application and declaration, the registration authority may reasonably require: reg 29(3) (amended by SI 1968/658). Applications under the Commons Registration (General) Regulations 1966, SI 1966/1471, reg 29 must be numbered in order of receipt and are entitled, unless rejected, to be given effect to on the register in that order: reg 29(4).

The registration authority must, on receipt of any application under reg 29 which it does not after preliminary consideration determine to reject, serve notice in the specified form upon every person (other than the applicant) appearing, either from the register or from any prior pending application, to be interested in the right of common referred to in the application, and, where the registration is provisional, upon the person on whose application it was made and any person whose application is noted under reg 9(5) (under which it is provided that where an application was made for the registration of a right of common attached to any land, but the right had already been registered in such manner that, if the application were acceded to, no conflict would arise between the two registrations, the registration authority was not register the right again but (unless it determined to reject the application) to note the application in the register): reg 29(5).

Upon the expiration of 40 days from the date on which reg 29(5) is complied with, the registration authority must further consider the application and must consider any written representations which it has received, and, if it deems the application well-founded, must make the necessary amendment to the register in the prescribed manner: reg 29(6).

6 As to the registration authorities see PARA 507.

7 See the text and notes 1-5.

8 Commons Registration (General) Regulations 1966, SI 1966/1471, reg 30(1). An authority to which such a notice is sent must annex it to the copy of the registration to which it relates and keep it available for public inspection at all reasonable times: reg 30(2). 'Concerned authority' in relation to a registration, means a local authority (other than the registration authority) in whose area any part of the land affected by the registration lies: reg 2(2).

9 Commons Registration (General) Regulations 1966, SI 1966/1471, reg 30(1); and see note 11.

10 It is corrected in accordance with the Commons Registration (General) Regulations 1966, SI 1966/1471, reg 36: see PARA 518.

11 Commons Registration Act 1965 s 14(b) (repealed in relation to the pilot areas in England by virtue of SI 2008/1960; prospectively repealed, in relation to the whole of England and Wales, by the Commons Act 2006

Sch 6 Pt 1, as from a day to be appointed under s 56(1); at the date at which this volume states the law, no such day had been appointed). As to the nature of the jurisdiction under the Commons Registration Act 1965 s 14 see *Betterment Properties (Weymouth) Ltd v Dorset County Council* [2008] EWCA Civ 22, [2008] 3 All ER 736, [2009] 1 WLR 334. The fact that a claimant could have raised all of its complaints under the Commons Registration Act 1965 s 14 does not oust the court's power to grant judicial review of the decision to register land under the 1965 Act: *R (on the application of Cheltenham Builders Ltd) v South Gloucestershire District Council* [2003] EWHC 2803 (Admin), [2004] 1 EGLR 85, [2003] All ER (D) 128 (Nov).

12 See the Commons Act 2006 (Commencement No 4 and Savings) (England) Order 2008, SI 2008/1960, reg 3(2), (3), (6).

13 As to the repeal of the Commons Registration Act 1965 ss 13(c), 14(b) in relation to the pilot areas see notes 5, 11.

14 See PARAS 526-527.

15 See PARA 534 et seq.

16 The land registered under the Commons Registration Act 1965: see PARA 508. As to the meaning of 'land' see PARA 403 note 1.

17 As to the meaning of 'common land' for these purposes see PARA 407.

18 See the Commons Registration Act 1965 s 13(a) (land ceasing to be common land or a town or village green), s 13(b) (land becoming common land or a town or village green) (s 13(a), (b) repealed by the Commons Act 2006 Sch 6 Pt 1). As to land which may be registered in England and Wales as a town or village green see now the Commons Act 2006 s 15; and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 541. Until ss 1-3 (see PARAS 526-527) are fully in force, new greens cannot be entered into the register of town or village greens to be maintained pursuant to the 2006 Act except in relation to the pilot areas in England; accordingly the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007, SI 2007/457, and the Commons (Registration of Town or Village Greens) (Interim Arrangements) (Wales) Regulations 2007, SI 2007/2396, enable registration authorities to register land, which meets the criteria for registration set out in the Commons Act 2006 s 15(1) or s 15(8), in the register of town or village greens maintained pursuant to the Commons Registration Act 1965. See further PARA 526 note 7; and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 541.

19 See note 18; and the Commons Act 2006 (Commencement No 1, Transitional Provisions and Savings) (England) Order 2006, SI 2006/2504, art 2(h)(i); the Commons Act 2006 (Commencement No 2, Transitional Provisions and Savings) (England) Order 2007, SI 2007/456, art 3(e)(i); the Commons Act 2006 (Commencement No 1, Transitional Provisions and Savings) (Wales) Order 2007, SI 2007/2386, art 3(p)(i).

20 See the Commons Act 2006 (Commencement No 1, Transitional Provisions and Savings) (England) Order 2006, SI 2006/2504, art 3(3); the Commons Act 2006 (Commencement No 2, Transitional Provisions and Savings) (England) Order 2007, SI 2007/456, art 4(3); the Commons Act 2006 (Commencement No 1, Transitional Provisions and Savings) (Wales) Order 2007, SI 2007/2386, art 4(2)(b), (6).

Where the Commons Registration Act 1965 s 13(b) still applies for transitional purposes, land can become common land after 2 January 1970 (the closing date for applications for registration of existing common land: see PARA 506) in any one of the following ways: (1) by or under any statute otherwise than as substituted land; (2) by a grant by the owner of the soil of rights of common over it; (3) by rights of common being acquired over it by prescription; or (4) by substitution or exchange for other land which has ceased to be common land under various statutes (as to which see PARA 517): see the Commons Registration (New Land) Regulations 1969, SI 1969/1843, Schedule Form 29 note 5. Note, however, that the Commons Act 2006 s 6 (not fully in force) further restricts the methods by which new rights of common can be created: see PARAS 467-469. As to applications for the registration of new common land see the Commons Registration (New Land) Regulations 1969, SI 1969/1843, regs 3, 4, 10; as to the disposal of applications by the registration authority see reg 5; as to the consideration of applications see reg 6; as to the method of registration see reg 7; as to information about the disposal of applications, and the procedure on rejection, see reg 8; and as to the registration of substituted land see reg 9. The Commons Commissioners have no jurisdiction to determine a dispute as to registration under the Commons Registration Act 1965 s 13: *R (on the application of Whitmey) v Commons Comrs* [2004] EWCA Civ 951, [2005] QB 282, [2004] 3 EGLR 1. As to the Commons Commissioners see PARA 425.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/3. REGISTRATION OF COMMON LAND/(2) REGISTRATION UNDER THE COMMONS REGISTRATION ACT 1965/517.
Registration of substituted land.

517. Registration of substituted land.

Provision is made for the registration under the Commons Registration Act 1965 of land¹ in substitution for registered land which has ceased to be common land² or a town or village green³ by virtue of having been compulsorily acquired⁴. This procedure does not apply in relation to the pilot areas in England⁵, where registration is governed by Part 1 of the Commons Act 2006⁶ and regulations made thereunder⁷.

1 As to registration under the Commons Registration Act 1965 see PARA 508; and as to the meaning of 'land' see PARA 403 note 1.

2 As to the meaning of 'common land' for these purposes see PARA 407.

3 As to land which may be registered in England and Wales as a town or village green see now the Commons Act 2006 s 15; and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 541.

4 See the Commons Registration (General) Regulations 1966, SI 1966/1471, reg 28. The specified enactments for these purposes are: (1) the Inclosure Act 1845 ss 147, 148 (see PARA 419); (2) the Acquisition of Land Act 1981 s 19 (see PARA 481); and (3) any other enactment providing, on the exchange of land, for the transfer of rights, trusts or incidents attaching to the land given in exchange from that land to the land taken in exchange and vice versa: Commons Registration (General) Regulations 1966, SI 1966/1471, reg 28(2). Where application is made to a registration authority for an amendment of the register in cases where registered land has ceased to be common land or a town or village green in these circumstances, and it appears to the authority that other, unregistered, land has become common land or a green in substitution for the land acquired, the authority must not give effect to the application until the substituted land has been registered: see reg 28(1), (3) (amended by SI 1969/1843). See, however, PARA 516 the text and notes 16-20. As to the registration authorities see PARA 507.

5 As to the pilot areas in England see PARA 467 text and notes 29-30.

6 Ie the Commons Act 2006 Pt 1 (ss 1-25) (not fully in force).

7 As to registration under the Commons Act 2006 Pt 1 (not fully in force) see PARA 521 et seq.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/3. REGISTRATION OF COMMON LAND/(2) REGISTRATION UNDER THE COMMONS REGISTRATION ACT 1965/518. Correction of errors.

518. Correction of errors.

Where any clerical error or omission, or error or omission of a like nature, is discovered in a register maintained under the Commons Registration Act 1965¹, the registration authority² must make the necessary correction provided this can be done without:

- 160 (1) increasing or diminishing the area of any land³ registered therein⁴;
- 161 (2) increasing the burden on any such land of any right of common so registered⁵;
- 162 (3) increasing the area of any land subject to any such right⁶;
- 163 (4) causing any registration to conflict with another registration⁷; or
- 164 (5) affecting any provisional or final registration⁸.

Where the correction affects any provisional registration, the registration authority must inform every concerned authority⁹ in writing and every such authority must make a corresponding correction in the copy of the registration held by it¹⁰.

This procedure does not apply in relation to the pilot areas in England¹¹, where registration is governed by Part 1 of the Commons Act 2006¹² and regulations made thereunder¹³.

1 le in the register of common land or the register of town or village greens maintained under the Commons Registration Act 1965 s 3(1): see PARA 510.

2 As to the registration authorities see PARA 507.

3 As to the meaning of 'land' see PARA 403 note 1.

4 Commons Registration (General) Regulations 1966, SI 1966/1471, reg 36(a).

5 Commons Registration (General) Regulations 1966, SI 1966/1471, reg 36(b).

6 Commons Registration (General) Regulations 1966, SI 1966/1471, reg 36(c).

7 Commons Registration (General) Regulations 1966, SI 1966/1471, reg 36(d).

8 See the Commons Registration (General) Regulations 1966, SI 1966/1471, reg 36(e).

9 As to the meaning of 'concerned authority' see PARA 516 note 8.

10 Commons Registration (General) Regulations 1966, SI 1966/1471, reg 36.

11 As to the pilot areas in England see PARA 467 text and notes 29-30.

12 le the Commons Act 2006 Pt 1 (ss 1-25) (not fully in force).

13 As to registration under the Commons Act 2006 Pt 1 (not fully in force) see PARA 521 et seq.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/3. REGISTRATION OF COMMON LAND/(2) REGISTRATION UNDER THE COMMONS REGISTRATION ACT 1965/519.
Removal of fraudulent registrations.

519. Removal of fraudulent registrations.

If the registration under the Commons Registration Act 1965 of any land¹ or rights of common² has become final³ and the High Court is satisfied that any person was induced by fraud to withdraw an objection to the registration or to refrain from making such an objection, the court may, if it deems it just to do so, order the register⁴ to be amended⁵.

There is a similar power under Part 1 of the Commons Act 2006⁶.

1 As to the meaning of 'land' see PARA 403 note 1.

2 As to the meaning of 'rights of common' see PARA 405.

3 I.e. under the Commons Registration Act 1965: see PARA 508.

4 I.e. the register of common land or the register of town or village greens maintained under the Commons Registration Act 1965 s 3(1): see PARA 510.

5 Commons Registration Act 1965 s 14(a) (repealed in relation to the pilot areas in England by virtue of SI 2008/1960; prospectively repealed, in relation to the whole of England and Wales, by the Commons Act 2006 Sch 6 Pt 1, as from a day to be appointed under s 56(1); at the date at which this volume states the law, no such day had been appointed). As to the pilot areas in England see PARA 467 text and notes 29-30.

As to the nature of the jurisdiction under the Commons Registration Act 1965 s 14 see the cases cited in PARA 516 note 11.

6 See the Commons Act 2006 s 19(7) (not fully in force); and PARA 534.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/3. REGISTRATION OF COMMON LAND/(2) REGISTRATION UNDER THE COMMONS REGISTRATION ACT 1965/520. Searches and copies of, and extracts from, the register.

520. Searches and copies of, and extracts from, the register.

Failure by a solicitor to make a search of the registers¹ in the case of vacant land may amount to negligence².

Any person may, on payment of the prescribed fee³, require from the registration authority a certified copy of, or extract from, the general part of any register, or any map or register unit forming part of the register⁴. Similar provisions apply under Part 1 of the Commons Act 2006⁵ in relation to the pilot areas in England⁶.

1 le the register of common land and the register of town or village greens maintained under the Commons Registration Act 1965 s 3(1) (see PARA 510) or continuing to be maintained under the Commons Act 2006 s 1 (not fully in force) (see PARA 526).

2 *G & K Ladenbau (UK) Ltd v Crawley and de Reya* [1978] 1 All ER 682, [1978] 1 WLR 266. The registers may be searched by means of Form CON290 Optional Inquiries of Local Authority (2007 Edn): see the Explanatory Notes to the Commons Registration (General) (Amendment) (England) (No 2) Regulations 2007, SI 2007/2404.

3 The prescribed fee is such reasonable fee as may be fixed by the registration authority according to the time and labour involved: see the Commons Registration (General) Regulations 1966, SI 1966/1471, Sch 3 (amended by SI 2007/2404; SI 2007/2597). As to the registration authorities see PARA 507.

4 Commons Registration (General) Regulations 1966, SI 1966/1471, reg 33.

5 le the Commons Act 2006 Pt 1 (ss 1-25) (not fully in force).

6 See the Commons Act 2006 s 21(2), (3) (not fully in force); the Commons Registration (England) Regulations 2008, SI 2008/1961, reg 54; and PARA 530.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/3. REGISTRATION OF COMMON LAND/(3) REGISTRATION UNDER THE COMMONS ACT 2006/(i) Procedure for Registration; in general/521. Power to make regulations.

(3) REGISTRATION UNDER THE

(i) Procedure for Registration; in general

521. Power to make regulations.

Regulations¹ may make provision as to the making and determination of any application² for the amendment of a register of common land or town or village greens³ under or for the purposes of Part 1⁴ of the Commons Act 2006⁵. Such regulations may in particular make provision as to:

- 165 (1) the steps to be taken by a person before making an application⁶;
- 166 (2) the form of an application⁷;
- 167 (3) the information or evidence to be supplied with an application⁸;
- 168 (4) the fee payable on an application (which may be a fee determined by the person to whom the application is made)⁹;
- 169 (5) the persons to be notified of an application¹⁰;
- 170 (6) the publication of an application¹¹;
- 171 (7) the making of objections to an application¹²;
- 172 (8) the persons who must be consulted, or whose advice must be sought, in relation to an application¹³;
- 173 (9) the holding of an inquiry before determination of an application¹⁴;
- 174 (10) the evidence to be taken into account in making a determination and the weight to be given to any evidence¹⁵;
- 175 (11) the persons to be notified of any determination¹⁶;
- 176 (12) the publication of a determination¹⁷;
- 177 (13) the amendments to be made by a commons registration authority¹⁸ to a register of common land or town or village greens pursuant to a determination¹⁹;
- 178 (14) the time at which any such amendments are to be regarded as having been made²⁰.

They may also include provision for the appropriate national authority²¹ to appoint a person to discharge any or all of its functions in relation to an application made to it²² with regard to the deregistration and exchange of land²³ registered as common land²⁴ or as a town or village green²⁵.

Regulations may also make provision as to the making and determination of any proposal by a commons registration authority to amend a register on its own initiative pursuant to certain provisions²⁶ of the 2006 Act²⁷. Such regulations may in particular make provision as to:

- 179 (a) the persons to be notified of a proposal²⁸;
- 180 (b) the publication of a proposal (and the information or evidence to be published with a proposal)²⁹;
- 181 (c) the making of objections to a proposal³⁰;
- 182 (d) the persons who must be consulted, or whose advice must be sought, in relation to a proposal³¹;
- 183 (e) the holding of an inquiry before determination of a proposal³²;

- 184 (f) the evidence to be taken into account in making a determination and the weight to be given to any evidence³³;
- 185 (g) the persons to be notified of any determination³⁴;
- 186 (h) the publication of a determination³⁵;
- 187 (i) the amendments to be made by a commons registration authority to a register of common land or town or village greens pursuant to a determination³⁶.

Regulations under any of the provisions set out above³⁷ may include provision for:

- 188 (i) the appropriate national authority to appoint persons as eligible to discharge functions of a commons registration authority in relation to applications made to, or proposals made by, the commons registration authority³⁸; and
- 189 (ii) the appointment of one or more of those persons to discharge functions of the commons registration authority in the case of any description of application or proposal³⁹.

They may also provide for the Church Commissioners to act with respect to any land or rights belonging to an ecclesiastical benefice of the Church of England which is vacant⁴⁰.

1 As to the meaning of 'regulations' see PARA 602 note 7.

2 In the case of an application made for the purposes of any of (1) the Commons Act 2006 ss 6-8, 12, 13 (not fully in force) (see PARAS 467, 493, 522, 525); (2) Sch 1 para 1 or Sch 1 para 3 (see PARAS 499, 501); (3) Sch 2 para 2 or Sch 2 para 3 (not fully in force) (see PARA 535; and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 542); and (4) Sch 3 para 2(5)(a) (not fully in force) (see PARA 541), regulations under s 24(1) may make provision as to the persons entitled to make the application: s 24(3). An application made for the purposes of any of (1) ss 6, 7, 10, 11, 12, 13 (not fully in force) (see PARAS 467, 493, 522-525) and s 15 (see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 541), and (2) Sch 1 para 1 or Sch 1 para 3 (see PARAS 499, 501) must, subject to any provision made by or under Pt 1 (ss 1-25) (not fully in force), be granted: s 24(4).

3 As to the meanings of 'register of common land' and 'register of town or village greens' see PARA 424 notes 7, 12. In relation to any area of England other than the pilot areas, however, and any area in Wales, references in the Commons Act 2006 s 24, and in regulations made thereunder, to a register of common land or town or village greens are, until the coming into force of s 1 (see PARA 526) in relation to that area, to be taken to be references to such a register maintained under the Commons Registration Act 1965 (see PARA 510 et seq): Commons Act 2006 (Commencement No 2, Transitional Provisions and Savings) (England) Order 2007, SI 2007/456, art 4(2); Commons Act 2006 (Commencement No 1, Transitional Provisions and Savings) (Wales) Order 2007, SI 2007/2386, art 4(2)(a).

4 In the Commons Act 2006 Pt 1 (ss 1-25) (not fully in force).

5 Commons Act 2006 s 24(1).

6 Commons Act 2006 s 24(2)(a).

7 Commons Act 2006 s 24(2)(b); and see PARA 549.

8 Commons Act 2006 s 24(2)(c); and see PARA 549.

9 Commons Act 2006 s 24(2)(d); and see PARA 549.

10 Commons Act 2006 s 24(2)(e); and see PARA 550.

11 Commons Act 2006 s 24(2)(f); and see PARA 550.

12 Commons Act 2006 s 24(2)(g); and see PARA 552.

13 Commons Act 2006 s 24(2)(h); and see PARAS 467, 522.

14 Commons Act 2006 s 24(2)(i); and see PARAS 553-554.

- 15 Commons Act 2006 s 24(2)(j); and see PARA 553.
- 16 Commons Act 2006 s 24(2)(k); and see PARA 555.
- 17 Commons Act 2006 s 24(2)(l); and see PARA 555.
- 18 As to the commons registration authorities see PARA 507.
- 19 Commons Act 2006 s 24(2)(m); and see PARA 555.
- 20 Commons Act 2006 s 24(2)(n).
- 21 As to the meaning of 'appropriate national authority' see PARA 411 note 1.
- 22 It made to it under the Commons Act 2006 s 16 (not yet in force in relation to Wales): see PARAS 545, 547.
- 23 As to the meaning of 'land' see PARA 403 note 1.
- 24 As to the meaning of 'land registered as common land' see PARA 424 note 7.
- 25 See the Commons Act 2006 s 24(5); and see PARA 545. As to the meaning of 'land registered as a town or village green' see PARA 424 note 12.
- 26 It pursuant to the Commons Act 2006 s 19, Sch 2 or Sch 3 para 2(5)(b) (not fully in force): see PARAS 534 et seq, 541.
- 27 Commons Act 2006 s 24(6).
- 28 Commons Act 2006 s 24(7)(a); and see PARA 551.
- 29 Commons Act 2006 s 24(7)(b); and see PARA 551.
- 30 Commons Act 2006 s 24(7)(c); and see PARA 552.
- 31 Commons Act 2006 s 24(7)(d).
- 32 Commons Act 2006 s 24(7)(e); and see PARAS 553-554.
- 33 Commons Act 2006 s 24(7)(f); and see PARA 553.
- 34 Commons Act 2006 s 24(7)(g); and see PARA 555.
- 35 Commons Act 2006 s 24(7)(h); and see PARA 555.
- 36 Commons Act 2006 s 24(7)(i); and see PARA 555.
- 37 It regulations under the Commons Act 2006 s 24: see the text and notes 1-36. See also the text and notes 38-40.
- 38 Commons Act 2006 s 24(8)(a); and see PARA 553.
- 39 Commons Act 2006 s 24(8)(b); and see PARA 553.
- 40 Commons Act 2006 s 24(9). As to the Church Commissioners see **ECCLESIASTICAL LAW**.

In relation to the pilot areas in England, where any land or rights of common belong to an ecclesiastical benefice of the Church of England and the benefice is vacant, anything done with respect to the land or rights of common which, if the benefice had an incumbent, might by virtue of the Commons Act 2006 or the Commons Registration (England) Regulations 2008, SI 2008/1961, be done by or to the incumbent may be done by or to the Church Commissioners: reg 50. As to the pilot areas in England see PARA 467 text and notes 29-30.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/3. REGISTRATION OF COMMON LAND/(3) REGISTRATION UNDER THE COMMONS ACT 2006/(ii) Registration of Rights of Common/522. Creation, variation and apportionment of rights.

(ii) Registration of Rights of Common

522. Creation, variation and apportionment of rights.

The creation of a right of common¹ in the restricted manners permitted under the Commons Act 2006² does not operate at law until on an application³:

- 190 (1) the right is registered in a register of common land⁴; and
- 191 (2) if the right is created over land⁵ not registered as common land⁶, the land is registered in a register of common land⁷.

A right of common which is registered in a register of common land or town or village greens⁸ cannot at any time after the commencement of the relevant provisions⁹ be varied¹⁰ so as to become exercisable over new land if that land is at the time registered as a town or village green¹¹. Furthermore, a right of common which is registered in a register of town or village greens cannot at any time after the commencement of those provisions¹² be varied so as to extend what can be done by virtue of the right¹³. The variation of a right of common which is registered in a register of common land or town or village greens:

- 192 (a) only has effect if it complies with such requirements as to form and content as regulations¹⁴ may provide; and
- 193 (b) does not operate at law until, on an application¹⁵, the register is amended so as to record the variation¹⁶.

Such an application to record a variation of a right of common consisting of a right to graze any animal¹⁷ is to be refused if in the opinion of the commons registration authority¹⁸ the land over which the right is or is to be exercisable would, in consequence of the variation, be unable to sustain the exercise of that right and, if the land is already registered as common land, any other rights of common registered as exercisable over the land¹⁹.

Regulations²⁰ may make provision as to the amendments to be made to a register of common land or town or village greens where a right of common which is registered in a register of common land or town or village greens as attached to any land is apportioned by virtue of any disposition affecting the land²¹. Such regulations may provide that a register is only to be amended when a disposition relating to an apportioned right itself falls to be registered under Part 1 of the Commons Act 2006²², or when the register falls to be amended on an application²³ for the re-allocation of attached rights²⁴. Where at any time:

- 194 (i) a right of common which is registered in a register of common land or town or village greens as attached to any land has been apportioned by virtue of any disposition affecting the land; and
- 195 (ii) no amendments have been so made²⁵ in respect of the apportionment of that right,

the rights of common subsisting as a result of the apportionment are to be regarded as rights which are registered in that register as attached to the land to which they attach as a result of the apportionment²⁶.

At the date at which this volume states the law, the above provisions were fully in force only in relation to the pilot areas in England²⁷.

1 As to the meaning of 'right of common' see PARA 405.

2 As to the creation of rights of common see the Commons Act 2006 s 6 (not fully in force); and PARA 467.

3 Is an application under the Commons Act 2006 s 6 (not fully in force): see PARA 467.

4 As to the meaning of 'register of common land' see PARA 424 note 7.

5 As to the meaning of 'land' see PARA 403 note 1.

6 As to the meaning of 'land registered as common land' see PARA 424 note 7.

7 See the Commons Act 2006 s 6(5) (not fully in force); and PARA 467.

8 As to the meaning of 'register of town or village greens' see PARA 424 note 12.

9 Is the commencement of the Commons Act 2006 s 7. See further the text and note 27.

10 For these purposes, a right of common is varied if by virtue of any disposition (1) the right becomes exercisable over new land to which the Commons Act 2006 Pt 1 (ss 1-25) (not fully in force) applies instead of all or part of the land over which it was exercisable; (2) the right becomes exercisable over new land to which Pt 1 applies in addition to the land over which it is already exercisable; (3) there is any other alteration in what can be done by virtue of the right: s 7(1) (not fully in force). As to the land to which Pt 1 applies see s 5; and PARA 424 note 6. A disposition having the effect referred to in s 7(1)(a) (see head (1) above) is not a surrender of a right of common within the meaning of s 13: see s 13(2) (not fully in force); and PARA 493.

11 Commons Act 2006 s 7(2) (not fully in force). As to the meaning of 'land registered as a town or village green' see PARA 424 note 12.

12 See note 9.

13 Commons Act 2006 s 7(3) (not fully in force).

14 As to the meaning of 'regulations' see PARA 602 note 7.

15 Is an application under the Commons Act 2006 s 7 (not fully in force). In relation to the pilot areas in England, an application under s 7 may only be made by (1) the owner of any part of the land over which the right of common was exercisable prior to the variation of that right; (2) the owner of any land over which the right of common becomes exercisable in consequence of the variation; or (3) (as the case may be) the owner of the land to which the right of common is attached, or the owner of the right of common in gross, and the application must show in which capacity it is made: Commons Registration (England) Regulations 2008, SI 2008/1961, Sch 4 para 2(1). The application must show that the following persons consent to it: (a) every person (other than the applicant) who is the owner of any land described in Sch 4 para 2(1)(a) or (b) (see heads (1), (2) above, and (as the case may be) of the land to which the right of common is attached, or of the right of common in gross; (b) any relevant leaseholder of any land described in Sch 4 para 2(1)(a) or (b); (c) any person having the benefit of a relevant charge over any land described in Sch 4 para 2(1)(a) or (b): Sch 4 para 2(2). The application must include (i) evidence of the applicant's capacity to make the application by virtue of Sch 4 para (1)(a), (b) or (c) (see heads (1)-(3) above); (ii) the numbers of the register unit and the rights section entry in the register of common land or town or village greens for the right of common to which the application relates; (iii) a description of the variation to be recorded; (iv) except where the right of common is held in gross, a description of the land to which the right of common is attached; and (v) where the right of common to be varied consists of a right to graze any animal, evidence that the land over which that right, in consequence of the variation, would be exercisable is able to sustain the exercise of that right (together with, if the land is already registered as common land, any other rights of common registered as exercisable over that land): Sch 4 para 2(3). Where it relates to only part of a right of common, the application must identify that part of the land to which it is attached and must be accompanied by an application made for the purposes of the Commons Act 2006 s 8 (see the text and notes 20-26): Commons Registration (England) Regulations 2008, SI 2008/1961, Sch 4 para 2(4). In addition to the persons and bodies listed in Sch 6 para 1 (see PARA 550 note 24), the application must be served on the following persons (other than the applicant): (A) the owner of the land over which the right of common is or was exercisable prior to the variation of the right; (B) the owner (if different) of any land over which the right of common became or is to become exercisable in consequence of the variation; (C) the owner of the land to which the right of common is attached, or the owner of the right of common in gross (as the case may be): Sch 6 para 2, Table. As to the pilot areas in England see PARA 467 text and notes 29-30; as to applications in relation to those areas see generally Pt 3 (regs 15-38); and PARAS 540, 549 et seq; as to the fee

to accompany the application see PARA 549 note 11; as to the service of documents see PARA 532 note 17; as to the meanings of 'right of common in gross', 'relevant leaseholder' and 'relevant charge' see PARA 468 notes 3-5; and as to land descriptions see reg 19; and PARA 468 note 7.

16 Commons Act 2006 s 7(4).

17 As to the meaning of 'right to graze' see PARA 435 note 2.

18 As to the commons registration authorities see PARA 507.

19 Commons Act 2006 s 7(5) (not fully in force). Subject to that, and to any other provision made by or under Pt 1 (not fully in force), an application made for the purposes of s 7 must be granted: see s 24(4). In relation to the pilot areas in England (see PARA 467 text and notes 29-30), the determining authority must consult Natural England before determining an application to register the variation, under s 7, of a right of common consisting of a right to graze any animal: Commons Registration (England) Regulations 2008, SI 2008/1961, reg 36. The 'determining authority' means (1) the Planning Inspectorate, in relation to an application or proposal which has been referred to it pursuant to reg 27(2) (see PARA 553); and (2) in relation to any other application or proposal, the registration authority which is required to determine it in accordance with reg 27(1) (see PARA 553): regs 2(1), 27(5)(a). 'The Planning Inspectorate' means the body of persons entrusted by the Secretary of State to carry out the functions of the Secretary of State in relation to appeals under the Town and Country Planning Act 1990 Pt III (ss 55-106) (control of development: see **TOWN AND COUNTRY PLANNING** vol 46(1) (Reissue) PARA 217 et seq); Commons Registration (England) Regulations 2008, SI 2008/1961, reg 2(1). As to the Planning Inspectorate see **TOWN AND COUNTRY PLANNING** vol 46(1) (Reissue) PARA 21.

20 As to the meaning of 'regulations' see PARA 602 note 7.

21 Commons Act 2006 s 8(1). Any apportionment must now be rateable: see s 9(5); and PARA 498. In relation to the pilot areas in England, an application for the purposes of s 8 (in relation to the apportionment of a right of common which is attached to land) must accompany any application ('the primary application') which is made under s 7 (see the text and notes 8-19), s 11 (see PARA 524), s 13 (see PARA 493), Sch 1 para 1(6)(b) or 3(7)(b) (see PARAS 499, 501), or the Commons Registration (England) Regulations 2008, SI 2008/1961, Sch 4 para 8 (see PARA 544 note 11), and which relates to only a part of a right of common: Sch 4 para 3(1). An application for the purposes of the Commons Act 2006 s 8 may be made in any other case in which a right of common is attached to land of which the ownership is divided into separate titles amongst two or more persons: Commons Registration (England) Regulations 2008, SI 2008/1961, Sch 4 para 3(2). The application may only be made (1) in the case of an application required to be made by Sch 4 para 3(1), by the person (and if more than one, by all such persons) by whom the primary application is made; (2) in the case of an application permitted to be made by Sch 4 para 3(2), by an owner of any part of the land to which the right of common is attached or by two or more such owners, acting jointly: Sch 4 para 3(3). The application must include (a) evidence of the capacity of the applicant, or (as the case may be) applicants, to make the application by virtue of Sch 4 para (3)(a) or (b) (see heads (1), (2) above); (b) the numbers of the register unit and the rights section entry in the register of common land or town or village greens for the right of common to which the application relates; (c) a description, and details of the ownership, of (i) the land to which is attached the part of the right of common which is the subject of the primary application, in the case of an application required to be made by Sch 4 para 3(1); or (ii) the land belonging to the applicant or (as the case may be) applicants, in the case of an application permitted to be made under Sch 4 para 3(2); (d) a calculation as to what constitutes a rateable apportionment of the right of common between the land in respect of which a description and details of ownership are required by head (c) above and any remaining land to which the right of common is attached; and (e) in the case of applications made by two or more owners of different parts of the land, an indication of the portions attaching to the part of each such applicant: Sch 4 para 3(4). In addition to the persons and bodies listed in Sch 6 para 1 (see PARA 550 note 24), the application must be served on the following persons (other than the applicant): (A) any person also required, in the case of a 'primary application' within the meaning given by Sch 4 para 3 or Sch 4 para 18, to be notified under the entry in Sch 6, Table relating to that primary application; (B) the owner of any land to which the right of common is attached: Sch 6 para 2, Table. As to the pilot areas in England see PARA 467 text and notes 29-30; as to applications in relation to those areas see generally Pt 3 (regs 15-38); and PARAS 540, 549 et seq; as to the fee to accompany the application see PARA 549 note 11; and as to the service of documents see PARA 532 note 17.

22 Ie under the Commons Act 2006 Pt 1 (ss 1-25) (not fully in force).

23 Ie the register falls to be amended under the Commons Act 2006 s 11 (not fully in force): see PARA 524.

24 See the Commons Act 2006 s 8(2).

25 Ie no amendments have been made under the Commons Act 2006 s 8(1) (not fully in force).

26 Commons Act 2006 s 8(3) (not fully in force).

27 See the Commons Act 2006 (Commencement No 4 and Savings) (England) Order 2008, SI 2008/1960, art 2(1)(b); the Commons Act 2006 (Commencement No 1, Transitional Provisions and Savings) (Wales) Order 2007, SI 2007/2386, art 2. As to the pilot areas in England see PARA 467 text and notes 29-30.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/3. REGISTRATION OF COMMON LAND/(3) REGISTRATION UNDER THE COMMONS ACT 2006/(ii) Registration of Rights of Common/523. Attachment of rights.

523. Attachment of rights.

At common law, it is impossible to convert a right of common in gross¹ into a right attached to land². The Commons Act 2006, however, provides that where any right of common³ is registered in a register of common land or town or village greens⁴ but is not registered as attached to any land⁵, the owner of the right may apply to the commons registration authority⁶ for the right to be registered in that register as attached to any land, provided that:

- 196 (1) he is entitled to occupy the land; or
- 197 (2) the person entitled to occupy the land has consented to the application⁷.

At the date at which this volume states the law, the above provisions were in force only in relation to the pilot areas in England⁸.

1 As to common of pasture in gross see PARAS 446-447.

2 It would, however, be possible for the owner of the right in gross to surrender it and for the owner of the common to grant a new right appurtenant to a property. As to the restrictions under the Commons Act 2006 on the surrender of a registered right of common see s 13 (not fully in force); and PARA 493. The existence of rights of common in gross is considered to make the management of common land more difficult: see the Explanatory Notes to the Commons Act 2006 para 77. As to common of pasture appendant or appurtenant see PARA 433 et seq.

3 As to the meaning of 'right of common' see PARA 405.

4 As to the meanings of 'register of common land' and 'register of town or village greens' see PARA 424 notes 7, 12.

5 As to the meaning of 'land' for registration purposes see PARA 403 note 1.

6 As to the commons registration authorities see PARA 507. In relation to the pilot areas in England, where an applicant under the Commons Act 2006 s 10 is not the person entitled to occupy the land to which the right of common is to be attached, the application must show that that person consents to the application: Commons Registration (England) Regulations 2008, SI 2008/1961, Sch 4 para 4(1). The application must include (1) the numbers of the register unit and the rights section entry in the register of common land or town or village greens for the right of common to which the application relates; (2) a description of the land to which that right of common is to be attached; and (3) evidence that (a) the applicant is the owner of the right of common to be attached; and (b) where a person's consent is given under Sch 4 para 4(1), that person is entitled to occupy the land to which the right of common is to be attached: Sch 4 para 4(2). An application under the Commons Act 2006 s 8 (apportionment: see PARA 522) must accompany the application: see PARA 522 note 21. In addition to the persons and bodies listed in Sch 6 para 1 (see PARA 550 note 24), the application must be served on the following persons (other than the applicant): (i) any person who is entitled to occupy the land to which the right of common is to be attached; (ii) the owner of the land over which the right of common is exercisable: Sch 6 para 2, Table. As to the pilot areas in England see PARA 467 text and notes 29-30; as to applications in relation to those areas see generally the Commons Registration (England) Regulations 2008, SI 2008/1961, Pt 3 (regs 15-38); and PARAS 540, 549 et seq; as to the fee to accompany the application see PARA 549 note 11; as to the service of documents see PARA 532 note 17; and as to land descriptions see reg 19; and PARA 468 note 7.

7 See the Commons Act 2006 s 10(1), (2) (not fully in force). Subject to any provision made by or under Pt 1 (ss 1-25) (not fully in force), an application made for the purposes of s 10 must be granted: see s 24(4).

8 See the Commons Act 2006 (Commencement No 4 and Savings) (England) Order 2008, SI 2008/1960, art 2(1)(b). As to the pilot areas in England see PARA 467 text and notes 29-30.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/3. REGISTRATION OF COMMON LAND/(3) REGISTRATION UNDER THE COMMONS ACT 2006/(ii) Registration of Rights of Common/524. Re-allocation of attached rights.

524. Re-allocation of attached rights.

Where a right of common¹ is registered in a register of common land or town or village greens² as attached to any land³, and the circumstances described in head (1), head (2) or head (3) below apply in relation to part of the land ('the relevant part'), the owner of the land⁴ may apply to the commons registration authority⁵ for the register to be amended so as to secure that the right does not attach to the relevant part⁶. The specified circumstances are:

- 198 (1) where the relevant part is not used for agricultural purposes⁷;
- 199 (2) where planning permission⁸ has been granted for use of the relevant part for purposes which are not agricultural purposes⁹;
- 200 (3) where:
 - 11
 - 13. (a) an order authorising the compulsory purchase of the relevant part by any authority has been made in accordance with the Acquisition of Land Act 1981¹⁰ and, if the order requires to be confirmed under Part 2 of that Act¹¹, has been so confirmed;
 - 14. (b) the relevant part has not vested in the authority; and
 - 15. (c) the relevant part is required for use other than use for agricultural purposes¹².
- 12

Regulations¹³ may provide that an application under these provisions is not to be granted without the consent of any person specified in the regulations¹⁴.

At the date at which this volume states the law, the above provisions were fully in force only in relation to the pilot areas in England¹⁵.

1 As to the meaning of 'right of common' see PARA 405.

2 As to the meanings of 'register of common land' and 'register of town or village greens' see PARA 424 notes 7, 12.

3 As to the meaning of 'land' for registration purposes see PARA 403 note 1.

4 As to the meaning of references to the owner of land see PARA 430 note 5.

5 As to the commons registration authorities see PARA 507. In relation to the pilot areas in England, an application under the Commons Act 2006 s 11 must show that the following persons consent to it: (1) any relevant leaseholder of the land to which the right of common is attached; (2) any person having the benefit of a relevant charge over that land: Commons Registration (England) Regulations 2008, SI 2008/1961, Sch 4 para 5(1). The application must include (a) evidence of the applicant's capacity (as owner of the land to which the right of common is attached) to make the application; (b) the numbers of the register unit and the rights section entry in the register of common land or town or village greens for the right of common to which the application relates; (c) a description of the land to which the right of common is attached; and (d) details of which part of that land qualifies as 'the relevant part' (as described in the Commons Act 2006 s 11(1)(b) (see the text to note 4), together with evidence for its so qualifying: Commons Registration (England) Regulations 2008, SI 2008/1961, Sch 4 para 5(2). Where it relates to only part of a right of common, the application must identify that part of the land to which it is attached and must be accompanied by an application made for the purposes of the Commons Act 2006 s 8 (apportionment: see PARA 522): Commons Registration (England) Regulations 2008, SI 2008/1961, Sch 4 para 5(3). In addition to the persons and bodies listed in Sch 6 para 1 (see PARA 550 note 24), the application must be served on the following persons (other than the applicant): (i) the owner of

the land over which the right of common is exercisable; (ii) in relation to an application to which the Commons Act 2006 s 11(4) (see the text and notes 10-12) applies, the authority authorised to effect the compulsory purchase of the relevant part of the land: Commons Registration (England) Regulations 2008, SI 2008/1961, Sch 6 para 2, Table. As to the meanings of 'relevant leaseholder' and 'relevant charge' see PARA 468 notes 4-5; as to the pilot areas in England see PARA 467 text and notes 29-30; as to applications in relation to those areas see generally Pt 3 (regs 15-38); and PARAS 540, 549 et seq; as to the fee to accompany the application see PARA 549 note 11; as to the service of documents see PARA 532 note 17; and as to land descriptions see reg 19; and PARA 468 note 7.

6 See the Commons Act 2006 s 11(1) (not fully in force).

7 See the Commons Act 2006 s 11(2) (not fully in force). Regulations may for the purposes of s 11(2)-(4) (see heads (1)-(3) in the text) make provision as to what is or is not to be regarded as use of land for agricultural purposes: s 11(5). As to the meaning of 'regulations' see PARA 602 note 7.

In relation to the pilot areas in England, for the purposes of s 11(2)-(4) the use of land for any of the following purposes is to be regarded as use of that land for agricultural purposes: (1) growing crops; (2) pasture or grazing; (3) forestry; (4) the keeping of land as woodland or scrubland; (5) any purpose in respect of which any payment under the single payment scheme is made; and 'single payment scheme' has the meaning it is given in the Common Agricultural Policy Single Payment and Support Schemes Regulations 2005, SI 2005/219 (ie the support scheme established under EC Council Regulation 1782/2003 (OJ L270, 21.10.2003, p 1) Title III, establishing common rules for direct support under the common agricultural policy and establishing certain support schemes for farmers: see the Common Agricultural Policy Single Payment and Support Schemes Regulations 2005, SI 2005/219, reg 2(1) (substituted by SI 2007/3182)): Commons Registration (England) Regulations 2008, SI 2008/1961, Sch 4 para 5(4), (5). As to the single payment scheme see **AGRICULTURAL PRODUCTION AND MARKETING** vol 1 (2008) PARA 753 et seq.

8 As to planning permission see **TOWN AND COUNTRY PLANNING** vol 46(1) (Reissue) PARA 213 et seq.

9 See the Commons Act 2006 s 11(3) (not fully in force). See also note 7.

10 As to compulsory purchase see PARA 479 et seq; and **COMPULSORY ACQUISITION OF LAND**.

11 Ie under the Acquisition of Land Act 1981 Pt II (ss 10-15): see **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARAS 557-571.

12 See the Commons Act 2006 s 11(4) (not fully in force). See also note 7.

13 As to the meaning of 'regulations' see PARA 602 note 7.

14 Commons Act 2006 s 11(6); and see note 5. Subject to that, and to any other provision made by or under Pt 1 (ss 1-25) (not fully in force), an application made for the purposes of s 11 must be granted: see s 24(4).

15 See the Commons Act 2006 (Commencement No 4 and Savings) (England) Order 2008, SI 2008/1960, art 2(1)(b); the Commons Act 2006 (Commencement No 1, Transitional Provisions and Savings) (Wales) Order 2007, SI 2007/2386, art 2. As to the pilot areas in England see PARA 467 text and notes 29-30.

UPDATE

524 Re-allocation of attached rights

NOTE 7--SI 2005/219 replaced by the Common Agricultural Policy Single Payment and Support Schemes Regulations 2009, SI 2009/3102.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/3. REGISTRATION OF COMMON LAND/(3) REGISTRATION UNDER THE COMMONS ACT 2006/(ii) Registration of Rights of Common/525. Transfer of rights in gross.

525. Transfer of rights in gross.

The transfer of a right of common¹ which is registered in a register of common land or town or village greens² but is not registered as attached to any land³ only has effect if it complies with such requirements as to form and content as regulations⁴ may provide⁵. Such a transfer does not operate at law until, on an application⁶, the transferee is registered in the register as the owner of the right⁷.

At the date at which this volume states the law, the above provisions were fully in force only in relation to the pilot areas in England⁸.

1 As to the meaning of 'right of common' see PARA 405.

2 As to the meanings of 'register of common land' and 'register of town or village greens' see PARA 424 notes 7, 12.

3 As to the meaning of 'land' for registration purposes see PARA 403 note 1.

4 As to the meaning of 'regulations' see PARA 602 note 7.

5 Commons Act 2006 s 12(a). A transfer must be by deed: Law of Property Act 1925 s 52(1); and see PARA 474. At the date at which this volume states the law, no regulations had been made under the Commons Act 2006 s 12 prescribing the form and content of the transfer as such; the Commons Registration (England) Regulations 2008, SI 2008/1961, Sch 4 para 6, cited in note 6, relates to the application and not to the transfer.

6 Ie an application under the Commons Act 2006 s 12 (not fully in force). In relation to the pilot areas in England, an application under s 12 may only be made by (1) the registered owner of the right of common in gross; or (2) the transferee of that right: Commons Registration (England) Regulations 2008, SI 2008/1961, Sch 4 para 6(1). Where the registered owner of the right of common in gross is not the applicant, the application must show that that registered owner consents to the application: Sch 4 para 6(2). The application must include (a) evidence of the applicant's capacity to make the application by virtue of Sch 4 para 6(1)(a) or (b) (see heads (1), (2) above); and (b) the numbers of the register unit and the rights section entry in the register of common land or town or village greens for the right of common to which the application relates: Sch 4 para 6(3). In addition to the persons and bodies listed in Sch 6 para 1 (see PARA 550 note 24), the application must be served on the following persons (other than the applicant): (i) the registered owner of the right of common in gross; (ii) the transferee or current owner of that right: Sch 6 para 2, Table. As to the pilot areas in England see PARA 467 text and notes 29-30; as to applications in relation to those areas see generally Pt 3 (regs 15-38); and PARAS 540, 549 et seq; as to the fee to accompany the application see PARA 549 note 11; as to the service of documents see PARA 532 note 17; and as to the meaning of 'right of common in gross' see PARA 468 note 3.

7 Commons Act 2006 s 12(b) (not fully in force). Subject to any provision made by or under Pt 1 (ss 1-25) (not fully in force), an application made for the purposes of s 12 must be granted: see s 24(4).

8 See the Commons Act 2006 (Commencement No 4 and Savings) (England) Order 2008, SI 2008/1960, art 2(1)(b); the Commons Act 2006 (Commencement No 1, Transitional Provisions and Savings) (Wales) Order 2007, SI 2007/2386, art 2. As to the pilot areas in England see PARA 467 text and notes 29-30.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/3. REGISTRATION OF COMMON LAND/(3) REGISTRATION UNDER THE COMMONS ACT 2006/(iii) The Registers/A. MAINTENANCE, PURPOSES, FORM AND CONTENT/526. Maintenance and purposes of registers.

(iii) The Registers

A. MAINTENANCE, PURPOSES, FORM AND CONTENT

526. Maintenance and purposes of registers.

Under the Commons Act 2006, each commons registration authority¹ must continue to keep a register known as a register of common land² and a register known as a register of town or village greens³. The purpose of a register of common land is:

- 201 (1) to register land⁴ as common land; and
- 202 (2) to register rights of common⁵ exercisable over land registered as common land⁶.

Similarly, the purpose of a register of town or village greens is:

- 203 (a) to register land as a town or village green⁷; and
- 204 (b) to register rights of common exercisable over land registered as a town or village green⁸.

At the date at which this volume states the law, the above provisions were in force only in relation to the pilot areas in England⁹. Registers of common land and of town or village greens in other areas of England, and throughout Wales, continue to be kept under the Commons Registration Act 1965¹⁰.

1 As to the commons registration authorities see PARA 507.

2 As to the meaning of 'register of common land' see PARA 424 note 7.

3 Commons Act 2006 s 1 (not fully in force). As to the meaning of 'register of town or village greens' see PARA 424 note 12.

4 As to the meaning of 'land' for registration purposes see PARA 403 note 1.

5 As to the meaning of 'right of common' see PARA 405.

6 Commons Act 2006 s 2(1) (not fully in force). As to the registration of rights of common see PARAS 522-525; and as to the meaning of 'land registered as common land' see PARA 424 note 7.

7 As to registration of town or village greens see the Commons Act 2006 s 15; and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 541. Where a commons registration authority grants an application under s 15 for the registration of land as a town or village green before s 1 (see the text and notes 1-3) has come into force in relation to the area in which the land is situated, it must register the land in the register of town or village greens maintained for that area under the Commons Registration Act 1965 and until the coming into force of the Commons Act 2006 s 1 in relation to that area, the 1965 Act applies in relation to the registration as if it had been made pursuant to the Commons Registration Act 1965 s 13(b) (repealed subject to transitional provisions and savings: see PARA 516): Commons Act 2006 (Commencement No 2, Transitional Provisions and Savings) (England) Order 2007, SI 2007/456, art 4(1); Commons Act 2006 (Commencement No 1, Transitional Provisions and Savings) (Wales) Order 2007, SI 2007/2386, art 4(1); and see PARA 516 note 18. As to the commons registration authorities see PARA 507.

8 Commons Act 2006 s 2(2) (not fully in force). As to the meaning of 'land registered as a town or village green' see PARA 424 note 12.

9 See the Commons Act 2006 (Commencement No 4 and Savings) (England) Order 2008, SI 2008/1960, art 2(1)(a); the Commons Act 2006 (Commencement No 1, Transitional Provisions and Savings) (Wales) Order 2007, SI 2007/2386, art 2. As to the pilot areas in England see PARA 467 text and notes 29-30.

10 As to the registers kept under the Commons Registration Act 1965 see PARA 510. See also note 7; and PARA 528.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/3. REGISTRATION OF COMMON LAND/(3) REGISTRATION UNDER THE COMMONS ACT 2006/(iii) The Registers/A. MAINTENANCE, PURPOSES, FORM AND CONTENT/527. Form and content of registers; in general.

527. Form and content of registers; in general.

The land¹ registered as common land² in a register of common land³ is, subject to Part 1 of the Commons Act 2006⁴, to be the land so registered in it at the commencement of the relevant statutory provision⁵ and such other land as may be so registered in it under that Part⁶.

The land registered as a town or village green⁷ in a register of town or village greens⁸ is, subject to Part 1 of the 2006 Act, to be the land so registered in it at the commencement of the relevant statutory provision⁹ and such other land as may be so registered in it under that Part¹⁰.

The rights of common¹¹ registered in a register of common land or town or village greens are, subject to Part 1 of the Commons Act 2006, to be the rights registered in it at the commencement of the relevant statutory provision¹² and such other rights as may be so registered in it under that Part¹³. The following information is to be registered in a register of common land or town or village greens in respect of a right of common registered in it:

- 205 (1) the nature of the right¹⁴;
- 206 (2) if the right is attached to any land, the land to which it is attached¹⁵;
- 207 (3) if the right is not so attached, the owner of the right¹⁶.

Regulations¹⁷ may require or permit other information to be included in a register of common land or town or village greens¹⁸ and may make provision as to the form in which any information is to be presented in such a register¹⁹.

Except as provided under Part 1 of the Commons Act 2006 or any other enactment:

- 208 (a) no land registered as common land or as a town or village green is to be removed from the register in which it is so registered²⁰;
- 209 (b) no right of common registered in a register of common land or town or village greens is to be removed from that register²¹.

No right of common over land to which Part 1 of the Commons Act 2006 applies²² is to be registered in the register of title²³.

At the date at which this volume states the law, the above provisions were fully in force only in relation to the pilot areas in England²⁴. Registers of common land and of town or village greens in other areas of England, and throughout Wales, continue to be kept under the Commons Registration Act 1965²⁵.

1 As to the meaning of 'land' see PARA 403 note 1.

2 As to the meaning of 'land registered as common land' see PARA 424 note 7.

3 As to the meaning of 'register of common land' see PARA 424 note 7.

4 Ie subject to the Commons Act 2006 Pt 1 (ss 1-25) (not fully in force).

5 Ie at the commencement of the Commons Act 2006 s 3. At the date at which this volume states the law, s 3 was fully in force only in relation to the pilot areas in England. Section 3 was brought into force in relation to

those areas on 1 October 2008: see the Commons Act 2006 (Commencement No 4 and Savings) (England) Order 2008, SI 2008/1960, art 2(1)(a).

6 Commons Act 2006 s 3(1) (not fully in force). As to the registration of common land see PARA 522 et seq.

7 As to the meaning of 'land registered as a town or village green' see PARA 424 note 12.

8 As to the meaning of 'register of town or village greens' see PARA 424 note 12.

9 See note 5.

10 Commons Act 2006 s 3(2) (not fully in force). As to land which may be registered in England and Wales as a town or village green under the Commons Act 2006 see s 15; and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 541. See also PARA 526 note 7.

11 As to the meaning of 'right of common' see PARA 405.

12 See note 5.

13 Commons Act 2006 s 3(3) (not fully in force).

14 Commons Act 2006 s 3(4)(a) (not fully in force). As to the different descriptions of rights of common see PARA 431 et seq.

15 Commons Act 2006 s 3(4)(b) (not fully in force). As to rights of common of pasture attached to land see PARA 433 et seq.

16 Commons Act 2006 s 3(4)(c) (not fully in force). As to rights of common of pasture in gross see PARAS 446-447. Note that no new rights in gross can be created: see PARAS 467, 498.

17 As to the meaning of 'regulations' see PARA 602 note 7.

18 Commons Act 2006 s 3(5)(a).

19 Commons Act 2006 s 3(5)(b).

20 Commons Act 2006 s 3(6)(a) (not fully in force).

21 Commons Act 2006 s 3(6)(b) (not fully in force).

22 As to the land to which the Commons Act 2006 Pt 1 applies see PARA 424 note 6.

23 Commons Act 2006 s 3(7) (not fully in force); and see the Land Registration Act 2002 s 33(d); and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 996. As to the meaning of 'register of title' see PARA 430 note 4.

24 See the Commons Act 2006 (Commencement No 4 and Savings) (England) Order 2008, SI 2008/1960, art 2(1)(a); the Commons Act 2006 (Commencement No 1, Transitional Provisions and Savings) (Wales) Order 2007, SI 2007/2386, art 2. As to the pilot areas in England see PARA 467 text and notes 29-30.

25 As to the registers kept under the Commons Registration Act 1965 see PARA 510. See also PARA 528.

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528. Form and content of the registers in the pilot areas.

The following provisions apply in relation to the pilot areas in England¹. Every register of common land or of town or village greens² is to consist of:

- 210 (1) a general part³;
- 211 (2) a register map⁴;
- 212 (3) as many register units as there are registrations of land in the register⁵; and
- 213 (4) such supplemental maps as may be necessary⁶.

Every register must be bound, but so that sheets can be added or removed without damage⁷.

Every new entry made in a register relating to registered land⁸, rights of common⁹ over such land, or the ownership of such land¹⁰, must be made in the appropriate section of the register unit relating to that land¹¹. A registration authority must, in making any registration (including an amendment to, or deletion of, a registration), follow as closely as possible the relevant model entry¹² with such variations and adaptations as the circumstances may require¹³. The registration authority may register new land¹⁴ as common land or as a town or village green by amending an existing register unit to include the new land or by inserting a new register unit¹⁵. Where land is to be registered pursuant to an order under the provisions relating to the deregistration and exchange of land¹⁶ or a determination under the regulations relating to applications and proposals to amend the registers¹⁷, and the order or determination relates to two or more parcels of land¹⁸, the registration authority may, if it thinks fit, prepare two or more register units, each comprising one or more parcels of land¹⁹.

Any entry made in a register before 1 October 2008²⁰ continues to have effect on and after that date, whether or not it complies with the above requirements, if it was made in accordance with:

- 214 (a) the Commons Registration Act 1965, or regulations under that Act²¹;
- 215 (b) the Common Land (Rectification of Registers) Act 1989, which is now repealed²²;
- 216 (c) the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007²³; or
- 217 (d) the Commons (Deregistration and Exchange Orders) (Interim Arrangements) (England) Regulations 2007²⁴.

1 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 1(c). As to the pilot areas in England see PARA 467 text and notes 29-30.

2 As to the meanings of 'register of common land' and 'register of town or village greens' see PARA 424 notes 7, 12.

3 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 5(1)(a). The general part of each register is to be in the prescribed form, and must contain details of (1) any agreement made under the Commons Act 2006 s 4(3) (see PARA 507) or the Commons Registration Act 1965 s 2(2) (repealed for these purposes, subject to transitional provisions and savings) to which the registration authority is a party; (2) any other transfer, to or from the registration authority, of responsibility for maintaining any register or register unit; and (3) any land in the area of the registration authority to which the Commons Act 2006 Pt 1 (ss 1-25)

does not apply, or is to be taken not to apply, by virtue of s 5 (see PARA 411): Commons Registration (England) Regulations 2008, SI 2008/1961, reg 5(2). For the prescribed form see Sch 2, Form 1. Schedule 3 Pt 1, Model Entries 1, 2 are provided for general guidance in complying with reg 5(2)(a) and (b) respectively (see heads (1), (2) above): reg 5(3). As to the registration authorities see PARA 507.

4 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 5(1)(b). 'Register map' means any map, other than a supplemental map, which, by virtue of any regulations made under either the Commons Registration Act 1965 or the Commons Act 2006, forms part of a register; and 'supplemental map' has the meaning given in reg 13 (see note 6): Commons Registration (England) Regulations 2008, SI 2008/1961, reg 2(1). Any register map prepared under the 2008 Regulations must be prepared in accordance with regs 9-12: reg 5(4).

Subject to reg 9(4), every registration authority must, for each of its registers, keep up to date a register map showing all the land registered in that register, in accordance with reg 9: reg 9(1). Every register map is to be based on the ordnance map: reg 9(2). A register map may consist of one or more sheets, and further sheets may be added from time to time as necessary: reg 9(3). Where any sheet of a register map was compiled before 1 July 1968, the registration authority (1) may retain that sheet as, or as part of, the register map in its existing form until the first occasion on which that sheet is required to be amended; and (2) must, on or before that occasion, prepare a fresh edition of that sheet which complies with reg 9: reg 9(4). Where a register map consists of more than one sheet, each sheet must bear a distinguishing number and the sheets must be bound together, but so that sheets can be added or removed without damage: reg 9(5). On every register map consisting of one sheet, and on every sheet of a register map consisting of more than one sheet, there must be included an entry in accordance with Sch 3 Pt 2, Standard Entry 1; and that entry must be stamped by, and signed on behalf of, the registration authority: reg 9(6). Where the registration authority considers it expedient to show any details on a larger scale than the scale of its register map, it may insert an inset map for that purpose: reg 9(7). Any new sheet which is added to a register map, or any fresh edition of a register map or sheet of a register map: (a) where the land to be described consists wholly of moorland, must be on a scale of not less than 1:10,560 (six inches to one mile); and (b) in all other cases, must be on a scale of not less than 1:2,500: reg 9(8). If an existing register map is to be amended (other than by adding a new sheet), the amendment must be shown, if necessary by means of an inset map: (i) if the land to which the amendment relates consists wholly of moorland, on a scale of not less than 1:10,560 (six inches to one mile); and (ii) in all other cases, on a scale of not less than 1:2,500: reg 9(9). 'Moorland' means any area of land shown coloured pink in the three volumes of maps, each entitled 'Moorland Map of England 2007' and marked with the number of the volume, dated 7 October 2007, signed on behalf of the Secretary of State for Environment, Food and Rural Affairs and deposited at the offices of the Department for Environment, Food and Rural Affairs at Ergon House, Horseferry Road, London SW1P 2AL: reg 2(1). As to the contents of register maps see reg 10; and as to register map overlays see reg 11.

A registration authority may prepare a fresh edition of a register map or of any sheet of a register map, showing only details of subsisting entries in the register: reg 12(1). A fresh edition of a sheet forming part of a register map must bear the same number as the sheet it is to replace: reg 12(2). A map or sheet which is replaced by a fresh edition must be marked on its face in accordance with Sch 3 Pt 2, Standard Entry 2, but remains part of the register: reg 12(3).

5 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 5(1)(c). Register units must be maintained in accordance with reg 6: reg 5(5). Subject to reg 6(2), each register unit is to consist of two sections, called the land section and the rights section: reg 6(1). In the case of a register unit which was prepared under regulations under the Commons Registration Act 1965, the register unit is additionally to consist of a third section, called the ownership section: Commons Registration (England) Regulations 2008, SI 2008/1961, reg 6(2). The land section of each register unit must be in the prescribed form, and is to (1) specify the land comprised in that registration, with a reference to the register map; and (2) contain any notes entered pursuant to an application under reg 47 (matters affecting the public: see PARA 533) in relation to that land: reg 6(3). For the prescribed form see Sch 2, Form 2. The rights section of each register unit must be in the prescribed form, and is to specify (a) the rights of common registered as exercisable over the land comprised in the land section of the register unit, or any part of that land; (b) the name and address of any person on whose application a right of common was registered, or the registration of a right of common was amended; (c) the provision of any enactment under or pursuant to which the registration or amendment was made; (d) in respect of a right of common which is attached to land, the land to which the rights are attached; (e) in respect of a right of common in gross, the name and address of the owner of that right; and (f) any declarations made pursuant to reg 44 (declaration of entitlement to right of common: see PARA 532): reg 6(4). For the prescribed form see Sch 2, Form 3. As to the meaning of 'right of common in gross' see PARA 468 note 3.

A registration authority must allot a distinguishing number to each register unit, and must compile a separate series of register unit numbers for its register of common land and its register of town or village greens: reg 6(5). Each register unit number must bear a prefix as follows; (i) in the case of a register unit in the register of common land, the prefix 'CL'; and (ii) in the case of a register unit in the register of town or village greens, the prefix 'VG': reg 6(6). The registration authority may, from time to time as necessary, add fresh register sheets to a register unit, and must mark every sheet forming part of a register unit with the number of that unit: reg 6(7).

6 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 5(1)(d). Supplemental maps must be prepared in accordance with reg 13: reg 5(6). Where (1) a right of common attached to any land is to be registered; or (2) any amendment is to be made to an entry relating to such a right, and that entry does not already contain a map describing the land to which that right is attached, the registration authority must, subject to reg 13(7), describe that land in the register by means of a map, to be called a supplemental map: reg 13(1). The registration authority must either (a) adopt as the supplemental map any map contained in or accompanying the application for registration, or amendment of a registration, which shows the land to which the right of common is attached or any part of that land; or (b) itself prepare a map showing the land to which the right of common is attached: reg 13(2). The scale of a supplemental map must be not less than 1:10,560 (six inches to one mile): reg 13(3). A supplemental map prepared by a registration authority may identify the land to which the right of common is attached in such manner as the registration authority thinks fit, and the means of identification used must be referred to in column 5 of the entry in the rights section of the register unit to which it relates, in accordance with Sch 3 Pt 2, Standard Entry 3: reg 13(4). The registration authority must stamp the supplemental map, with the stamp bearing the date on which the right of common is registered or the registration is amended, and must indorse it in accordance with Sch 3 Pt 2, Standard Entry 4, and the supplemental map then forms part of the register: reg 13(5). The registration authority must keep all the supplemental maps (i) for each register, in register unit order; and (ii) for each register unit, in entry number order: reg 13(6). When registering, or amending the registration of, a right of common which is attached to land that comprises a dwelling, the registration authority may describe that land either (A) by entering a description of the dwelling, including the Ordnance Survey grid reference of its location, in column 5 of the rights section of the register; or (B) by means of a supplemental map: reg 13(7).

7 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 5(7). Where (1) in accordance with the 2008 Regulations, an amendment is to be made to an entry in the register (other than to any map), and that entry is recorded on a register sheet which does not comply with the requirements of those regulations; or (2) at the discretion of the registration authority, a register sheet is to be replaced, the registration authority must ensure that all the entries recorded on that sheet are transferred to the appropriate replacement sheet prescribed in the 2008 Regulations, with the exception of any entry or information which has been cancelled or deleted: reg 8(1). The registration authority must stamp any replacement register sheet, with the stamp bearing the date of its creation reg 8(2). The replacement register sheet then forms part of the register and the original register sheet must be marked in accordance with Sch 3 Pt 2, Standard Entry 2 but does not cease to be part of the register: reg 8(3).

8 As to the meaning of 'registered land' see PARA 477 note 9.

9 As to the meaning of 'right of common' see PARA 405.

10 As to the meaning of references to the ownership of land see PARA 430 note 5.

11 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 7(1).

12 'Relevant model entry' means, in relation to a registration made under or pursuant to the provision set out in the Commons Registration (England) Regulations 2008, SI 2008/1961, reg 7(3), Table, col 1, the corresponding model entry in Sch 3 Pt 1 specified in reg 7(3), Table, col 2: see reg 7(3).

13 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 7(2).

14 As to the meaning of 'land' for registration purposes see PARA 403 note 1.

15 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 7(4).

16 I.e an order under the Commons Act 2006 s 17: see PARA 548.

17 I.e a determination under the Commons Registration (England) Regulations 2008, SI 2008/1961, Pt 3 (regs 15-38).

18 For these purposes, 'parcel of land' means an area of land required to be registered, along with other land, pursuant to an order or determination, and having no common boundary with any of that other land: Commons Registration (England) Regulations 2008, SI 2008/1961, reg 7(6).

19 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 7(5).

20 I.e the date when the Commons Registration (England) Regulations 2008, SI 2008/1961, came into force in relation to the pilot areas in England: see reg 1(b), (c).

21 As to registration under the Commons Registration Act 1965 see PARA 506 et seq.

22 The Common Land (Rectification of Registers) Act 1989 was repealed by the Commons Act 2006 Sch 6 Pt 1, with effect from 1 October 2006 in relation to the whole of England: see the Commons Act 2006 (Commencement No 1, Transitional Provisions and Savings) (England) Order 2006, SI 2006/2504, art 2(h)(v).

23 The Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007, SI 2007/457, are revoked in relation to the pilot areas: see the Commons Registration (England) Regulations 2008, SI 2008/1961, reg 55(1)(a). As to those regulations see PARA 516 note 18; and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARAS 542-544.

24 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 14. The Commons (Deregistration and Exchange Orders) (Interim Arrangements) (England) Regulations 2007, SI 2007/2585, are revoked in relation to the pilot areas: see the Commons Registration (England) Regulations 2008, SI 2008/1961, reg 55(1)(b). As to those regulations see further PARA 548.

UPDATE

528 Form and content of the registers in the pilot areas

NOTES 4, 12--SI 2008/1961 regs 7(3), 9(8), (9) amended: SI 2009/2018.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/3. REGISTRATION OF COMMON LAND/(3) REGISTRATION UNDER THE COMMONS ACT 2006/(iii) The Registers/A. MAINTENANCE, PURPOSES, FORM AND CONTENT/529. Conclusiveness of registers.

529. Conclusiveness of registers.

The following provisions apply to land¹ registered as common land², or as a town or village green³, which is registered as being subject to a right of common⁴:

- 218 (1) if the land would not otherwise have been subject to that right, it is deemed to have become subject to that right, as specified in the register, upon its registration⁵; but nothing in this provision affects any constraint on the exercise of a right of common where the constraint does not appear in the register⁶;
- 219 (2) if the right is registered as attached to any land⁷, the right is deemed, if it would not otherwise have attached to that land, to have become so attached upon registration of its attachment⁸;
- 220 (3) if the right is not registered as attached to any land⁹, the person registered as the owner of the right is deemed, if he would not otherwise have been its owner, to have become its owner upon his registration¹⁰.

It is immaterial whether the registration referred to in head (1), head (2) or head (3) above occurred before or after the commencement of these provisions¹¹.

At the date at which this volume states the law, the above provisions were in force only in relation to the pilot areas in England¹². Registers of common land and of town or village greens in other areas of England, and throughout Wales, continue to be kept under the Commons Registration Act 1965¹³.

1 As to the meaning of 'land' for registration purposes see PARA 403 note 1.

2 As to the meaning of 'land registered as common land' see PARA 424 note 7.

3 As to the meaning of 'land registered as a town or village green' see PARA 424 note 12. As to land which may be registered in England and Wales as a town or village green under the Commons Act 2006 see s 15; and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 541. See also PARA 526 note 7.

4 Commons Act 2006 s 18(1) (not fully in force). As to the meaning of 'right of common' see PARA 405.

5 Commons Act 2006 s 18(2) (not fully in force).

6 Commons Act 2006 s 18(5) (not fully in force).

7 As to rights of common of pasture attached to land see PARA 433 et seq.

8 Commons Act 2006 s 18(3) (not fully in force).

9 As to rights of common of pasture in gross see PARAS 446-447.

10 Commons Act 2006 s 18(4) (not fully in force).

11 Commons Act 2006 s 18(6) (not fully in force).

12 See the Commons Act 2006 (Commencement No 4 and Savings) (England) Order 2008, SI 2008/1960, art 2(1)(d); the Commons Act 2006 (Commencement No 1, Transitional Provisions and Savings) (Wales) Order 2007, SI 2007/2386, art 2. As to the pilot areas in England see PARA 467 text and notes 29-30.

13 As to the registers kept under the Commons Registration Act 1965 see PARA 510. See also PARA 528.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/3. REGISTRATION OF COMMON LAND/(3) REGISTRATION UNDER THE COMMONS ACT 2006/(iii) The Registers/A. MAINTENANCE, PURPOSES, FORM AND CONTENT/530. Inspection of registers; official copies.

530. Inspection of registers; official copies.

Any person may inspect and make copies of, or of any part of:

- 221 (1) a register of common land or town or village greens¹;
- 222 (2) any document kept by a commons registration authority² which is referred to in such a register³;
- 223 (3) any other document kept by a commons registration authority which relates to an application made at any time in relation to such a register⁴.

The right described above is subject to regulations⁵ which may, in particular:

- 224 (a) provide for exceptions to the right⁶;
- 225 (b) impose conditions on its exercise⁷, including conditions requiring the payment of a fee, which may be a fee determined by a commons registration authority⁸.

An official copy of, or of any part of:

- 226 (i) a register of common land or town or village greens,
- 227 (ii) any document kept by a commons registration authority which is referred to in such a register, or
- 228 (iii) any other document kept by a commons registration authority which relates to an application made at any time in relation to such a register,

is admissible in evidence to the same extent as the original⁹. Regulations may make provision for the issue of official copies and may in particular make provision about:

- 229 (A) the form of official copies;
- 230 (B) who may issue official copies;
- 231 (C) applications for official copies;
- 232 (D) the conditions to be met by applicants for official copies¹⁰, including conditions requiring the payment of a fee, which may be a fee determined by a commons registration authority¹¹.

At the date at which this volume states the law, the above provisions were fully in force only in relation to the pilot areas in England¹². Registers of common land and of town or village greens in other areas of England, and throughout Wales, continue to be kept under the Commons Registration Act 1965¹³.

1 Commons Act 2006 s 20(1)(a) (not fully in force). As to the meanings of 'register of common land' and 'register of town and village greens' see PARA 424 notes 7, 12.

2 As to the commons registration authorities see PARA 507.

3 Commons Act 2006 s 20(1)(b) (not fully in force).

4 Commons Act 2006 s 20(1)(c) (not fully in force).

5 As to the meaning of 'regulations' see PARA 602 note 7.

6 Commons Act 2006 s 20(2)(a) (not fully in force).

7 Commons Act 2006 s 20(2)(b) (not fully in force).

8 See the Commons Act 2006 s 20(3) (not fully in force). In relation to the pilot areas in England, any request to inspect or make copies of any document referred to in s 20(1)(b) or (c) must be treated by the registration authority as a request for information under the relevant legislation: Commons Registration (England) Regulations 2008, SI 2008/1961, reg 53(1). Where the relevant legislation does not require the information contained in the document to be communicated or made available, the registration authority may refuse to permit inspection, or copies to be taken, of that document: reg 53(2). For these purposes and the purposes of reg 54 (see note 11), 'relevant legislation' means the Environmental Information Regulations 2004, SI 2004/3391, or the Freedom of Information Act 2000: Commons Registration (England) Regulations 2008, SI 2008/1961, reg 53(3). As to the pilot areas in England see PARA 467 text and notes 29-30.

9 Commons Act 2006 s 21(1) (not fully in force).

10 Commons Act 2006 s 21(2) (not fully in force).

11 See the Commons Act 2006 s 21(3) (not fully in force). In relation to the pilot areas in England, any person may request a registration authority to provide an official copy of, or of any part of, any register or document referred to in s 21(1): Commons Registration (England) Regulations 2008, SI 2008/1961, reg 54(1). A registration authority may charge a fee for providing an official copy, not exceeding its costs in providing official copies: reg 54(2). Subject to reg 54(4), upon receiving a request for an official copy, and payment of any fee, a registration authority must provide an extract from the register or a copy of the document, certified on behalf of the registration authority as a true extract or copy as at the date of issue: reg 54(3). A registration authority may refuse a request to provide an official copy of, or of any part of, a document referred to in the Commons Act 2006 s 20(1)(b) or (c) where the relevant legislation does not require the information contained in the document to be communicated or made available: Commons Registration (England) Regulations 2008, SI 2008/1961, reg 54(4). See also note 8.

12 See the Commons Act 2006 (Commencement No 4 and Savings) (England) Order 2008, SI 2008/1960, art 2(1)(e); the Commons Act 2006 (Commencement No 1, Transitional Provisions and Savings) (Wales) Order 2007, SI 2007/2386, art 2. As to the pilot areas in England see PARA 467 text and notes 29-30.

13 As to the registers kept under the Commons Registration Act 1965 see PARA 510. See also PARA 528.

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531. Electronic registers.

Regulations¹ may require or permit the whole or any part of a register kept under Part 1 of the Commons Act 2006² to be kept in electronic form³. Such regulations may include provision as to:

- 233 (1) requirements to be complied with in relation to the recording of information in electronic form⁴;
- 234 (2) the certification of information recorded in electronic form, including the status of print-outs of such information⁵.

Such regulations may also include provision as to the process of converting a register, or part of a register, into electronic form⁶, including in particular provision:

- 235 (a) as to the publicity to be given to such a conversion⁷;
- 236 (b) requiring a provisional electronic version to be made available for inspection and comment⁸;
- 237 (c) as to the holding of an inquiry in relation to any question arising as a result of the conversion⁹.

At the date at which this volume states the law, the above provisions were not in force in relation to any area in England, and were in force in relation to Wales only in so far as they confer a power, or impose a duty, on the Welsh Ministers¹⁰ to make, or make provision by, regulations¹¹.

1 As to the meaning of 'regulations' see PARA 602 note 7.

2 Ie under the Commons Act 2006 Pt 1 (ss 1-25) (not fully in force). As to the registers to be kept under Pt 1 see PARA 522 et seq.

3 Commons Act 2006 s 25(1) (not fully in force).

4 Commons Act 2006 s 25(2)(a) (not fully in force).

5 Commons Act 2006 s 25(2)(b) (not fully in force).

6 Commons Act 2006 s 25(3) (not fully in force).

7 Commons Act 2006 s 25(4)(a) (not fully in force).

8 Commons Act 2006 s 25(4)(b) (not fully in force).

9 Commons Act 2006 s 25(4)(c) (not fully in force).

10 As to the Welsh Ministers see PARA 423.

11 See the Commons Act 2006 (Commencement No 1, Transitional Provisions and Savings) (Wales) Order 2007, SI 2007/2386, art 2.

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Declaration of entitlement to right of common.

B. MISCELLANEOUS MATTERS TO BE ENTERED IN REGISTERS IN THE PILOT AREAS

532. Declaration of entitlement to right of common.

The owner¹ of:

- 238 (1) a freehold estate in land² in the pilot areas in England³ to which a right of common⁴ is attached; or
- 239 (2) a leasehold estate in any such land, excluding one that is granted for a term of three years or less from the date of grant,

may apply⁵ to amend the relevant entry in the rights section of the register unit⁶ relating to all or part of the land over which the right is exercisable, to record a declaration of the applicant's entitlement to exercise the right⁷. An applicant must provide one of the following with such an application:

- 240 (a) a copy of the register of title⁸ to all or part of the land to which the right is attached, which records the applicant's ownership of an estate referred to in head (1) or head (2) above; or
- 241 (b) where the land is not registered in the register of title, other evidence of the applicant's ownership of an estate so referred to⁹.

An applicant must also provide details of:

- 242 (i) the numbers of the register unit and the rights section entry in the register of common land or town or village greens¹⁰ for the right of common to which the application relates; and
- 243 (ii) where the declaration relates to only part of the land to which the right of common in the register entry is shown as attached, an explanation of how the applicant has calculated the extent to which the right of common is exercisable in relation to the part of the land to which the declaration relates¹¹.

On receipt of such an application, the registration authority¹² must allocate a reference number to it¹³.

Where a declaration is entered in a register pursuant to such an application, the registration authority must send the applicant a copy of the entry¹⁴.

If a registration authority believes that an entry made in a register pursuant to such an application contains a material error, or that the person who made the declaration is no longer the owner of the land to which the right of common is attached, it may¹⁵ cancel the declaration¹⁶. Before cancelling the declaration the registration authority must serve¹⁷ on the person who made the declaration notice in writing of its intention to do so¹⁸. It must consider any representations made by that person within 28 days of being served with the notice¹⁹.

- 1 As to the meaning of references to the ownership of land see PARA 430 note 5.
- 2 As to the meaning of 'land' for registration purposes see PARA 403 note 1.
- 3 As to the pilot areas in England see PARA 467 text and notes 29-30.
- 4 As to the meaning of 'right of common' see PARA 405.
- 5 The Commons Registration (England) Regulations 2008, SI 2008/1961, regs 16(1), 17 (see PARA 549) but no other regulations within Pt 3 (regs 15-38) (see PARA 549 et seq) apply to such an application: reg 15(2).
- 6 As to the register unit see PARA 527.
- 7 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 44(1).
- 8 As to the meaning of 'register of title' see PARA 430 note 4.
- 9 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 44(2).
- 10 As to the meanings of 'register of common land' and 'register of town or village greens' see PARA 424 note 12.
- 11 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 44(3).
- 12 As to the registration authorities see PARA 507.
- 13 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 44(4).
- 14 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 44(5).
- 15 In subject to the Commons Registration (England) Regulations 2008, SI 2008/1961, reg 44(7): see the text and notes 17-19.
- 16 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 44(6).
- 17 Any requirement in the Commons Registration (England) Regulations 2008, SI 2008/1961, to serve a document on another person is satisfied, if that person cannot be found, by leaving the document at that person's last known address or by sending the document by post to that address: reg 52. Any requirement by or under those regulations for a person to send a notice or document to another person may be met by means of an electronic communication if (1) it results in the information contained in that notice or document being available to the other person in a form similar to the form in which it would appear in a notice or document sent in printed form; and (2) except where the other person is the determining authority, the other person consents to the notice or document being sent by those means: reg 51(1). A person who has provided an email address is to be treated as consenting to a document being sent by email: reg 51(2). Any requirement in the 2008 Regulations for a document to be signed does not apply in the case of a document sent by means of an electronic communication: reg 51(3). Regulation 51(1)-(3) does not apply in relation to the submission of an application form to a registration authority: reg 51(4). 'Electronic communication' has the meaning given in the Electronic Communications Act 2000 s 15(1) (see **TELECOMMUNICATIONS AND BROADCASTING** vol 45(1) (2005 Reissue) PARA 616): Commons Registration (England) Regulations 2008, SI 2008/1961, reg 2(1).
- 18 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 44(7)(a).
- 19 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 44(7)(b).

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533. Matters affecting the public.

Where registered land¹ in the pilot areas in England² is affected by any of the specified matters³, the registration authority⁴:

- 244 (1) must, on an application⁵ made in accordance with the following provisions, enter a note of the matter in the land section of the register⁶; and
- 245 (2) may enter such a note on its own initiative⁷.

Such an application may be made by:

- 246 (a) any local authority⁸, other than the registration authority, in whose area any part of the land lies;
 - 247 (b) any person with a function relating to the management or regulation of the land conferred by a specified instrument or enactment⁹; or
 - 248 (c) in the case of an application to note certain matters relating to common land to which the public has access¹⁰:
- 13
- 16. (i) the owner of any part of the land;
 - 17. (ii) any person appearing from the register to be entitled to exercise a right of common over the land¹¹.
- 14

Where a note is entered in a register pursuant to an application, the registration authority must send the applicant a copy of the entry¹².

A registration authority may cancel an entry under these provisions if it is satisfied on reasonable grounds that the matter to which the entry relates is no longer subsisting¹³.

1 As to the meaning of 'registered land' see PARA 477 note 9.

2 As to the pilot areas in England see PARA 467 text and notes 29-30.

3 The matters referred to in the Commons Registration (England) Regulations 2008, SI 2008/1961, reg 47(2). Those matters are (1) a scheme made under the Commons Act 1899 Pt I (ss 1-15) (see PARAS 427, 590-598) or under the Metropolitan Commons Acts 1866 to 1898 (see **LONDON GOVERNMENT**); (2) a local Act regulating the land; (3) an order of regulation made under the Commons Act 1876 and confirmed by a provisional order confirmation Act; (4) a declaration made by deed under the Law of Property Act 1925 s 193(2) which declares that s 193 (see PARA 581) is to apply to the land; (5) a limitation and condition imposed under s 193(1) proviso (b) (see PARA 581); (6) an order made under the Commons Act 2006 Pt 2 (ss 26-37) (see PARA 601 et seq) establishing a commons council: Commons Registration (England) Regulations 2008, SI 2008/1961, reg 47(2).

4 As to the registration authorities see PARA 507.

5 The Commons Registration (England) Regulations 2008, SI 2008/1961, Pt 3 (regs 15-38) (see PARA 549 et seq) does not apply in relation to such an application: reg 15(3).

6 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 47(1)(a). As to the land section of the register see PARA 528.

7 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 47(1)(b).

8 For these purposes, 'local authority' means a county council, a district council, a London borough council, a National Park authority, a parish council or the chairman of a parish meeting: Commons Registration (England) Regulations 2008, SI 2008/1961, reg 2(1).

9 Ie an instrument or enactment mentioned in the Commons Registration (England) Regulations 2008, SI 2008/1961, reg 47(2)(a), (b) or (c): see note 3 heads (1)-(3).

10 Ie in the case of an application to note a matter referred to in the Commons Registration (England) Regulations 2008, SI 2008/1961, reg 47(2)(d) or (e): see note 3 heads (4), (5).

11 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 47(3).

12 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 47(4).

13 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 47(5).

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C. RECTIFICATION OF ERRORS AND OMISSIONS IN REGISTERS

(A) CORRECTION OF REGISTERS; IN GENERAL

534. Correction of registers.

A commons registration authority¹ may amend its register of common land or town or village greens² for any of the following purposes³, namely:

- 249 (1) correcting a mistake⁴ made by the commons registration authority in making or amending an entry in the register⁵;
- 250 (2) correcting any other mistake, where the amendment would not affect:
15
 - 18. (a) the extent of any land registered as common land⁶ or as a town or village green⁷; or
 - 19. (b) what can be done by virtue of a right of common⁸;
- 16 251 (3) removing a duplicate entry from the register⁹;
- 252 (4) updating the details of any name or address referred to in an entry¹⁰;
- 253 (5) updating any entry in the register relating to land registered as common land or as a town or village green to take account of accretion or diluvion¹¹.

An amendment may be made by a commons registration authority on its own initiative¹² or on the application of any person¹³.

A mistake in a register may not be corrected under the above provisions if the authority considers that, by reason of reliance reasonably placed on the register by any person or for any other reason, it would in all the circumstances be unfair to do so¹⁴.

Regulations¹⁵ may make further provision as to the criteria to be applied in determining an application or proposal under these provisions¹⁶.

The High Court may order a commons registration authority to amend its register of common land or town or village greens if the High Court is satisfied that any entry in the register, or any information in an entry, was at any time included in the register as a result of fraud¹⁷ and that it would be just to amend the register¹⁸.

At the date at which this volume states the law, the above provisions were fully in force only in relation to the pilot areas in England¹⁹. Registers of common land and of town or village greens in other areas of England, and throughout Wales, continue to be kept under the Commons Registration Act 1965²⁰.

1 As to the registration authorities see PARA 507.

2 As to the meanings of 'register of common land' and 'register of town or village greens' see PARA 424 notes 7, 12.

3 Commons Act 2006 s 19(1) (not fully in force).

4 For these purposes, references to a mistake include (1) a mistaken omission; and (2) an unclear or ambiguous description; and it is immaterial for these purposes whether a mistake was made before or after the commencement of the Commons Act 2006 s 19: s 19(3) (not fully in force).

5 Commons Act 2006 s 19(2)(a) (not fully in force).

6 As to the meaning of 'land registered as common land' see PARA 424 note 7.

7 As to the meaning of 'land registered as a town or village green' see PARA 424 note 12.

8 Commons Act 2006 s 19(2)(b) (not fully in force). As to the meaning of 'right of common' see PARA 405.

9 Commons Act 2006 s 19(2)(c) (not fully in force).

10 Commons Act 2006 s 19(2)(d) (not fully in force).

11 Commons Act 2006 s 19(2)(e) (not fully in force). As to accretion and diluvion see **WATER AND WATERWAYS** vol 100 (2009) PARA 39 et seq.

12 Commons Act 2006 s 19(4)(a) (not fully in force). In relation to the pilot areas in England, where the proposal to amend the registers seeks to add land to, or to remove land from, a register, or to correct an error as to the quantification of rights of common in a register, the registration authority must refer it to the Planning Inspectorate for determination: see the Commons Registration (England) Regulations 2008, SI 2008/1961, reg 27(2)(b), (3)(b); and PARA 553. As to the pilot areas in England see PARA 467 text and notes 29-30; and as to the meaning of 'the Planning Inspectorate' see PARA 522 note 19.

13 Commons Act 2006 s 19(4)(b) (not fully in force). In relation to the pilot areas in England, an application made under s 19(4)(b) must include (1) a statement of the purpose (being one of those described in s 19(2): see heads (1)-(5) in the text) for which the application is made; (2) the number of the register unit and, in so far as is relevant to the mistake or other matter in the register in respect of which the application seeks correction, the number of the rights section entry, in the register of common land or town or village greens to which the application relates; (3) evidence of the mistake or other matter in the register in respect of which the application seeks correction; and (4) a description of the amendment sought in the register of common land or town or village greens: Commons Registration (England) Regulations 2008, SI 2008/1961, Sch 4 para 11. In addition to the registration authority's duty to publicise the application under reg 21(1) (see PARA 550), where the application is for the removal of registered land from, or for the addition of land to, a register, the authority must, as soon as reasonably practicable after receiving the application, (a) publish a notice of the application in such one or more newspapers circulating in the relevant area as appears to the authority to be sufficient to secure adequate publicity; and (b) serve a notice of the application on every other local authority for that area: see reg 21(2)(b), (3). 'Relevant area', in relation to an application or proposal, means the area of the land to which the application or proposal relates: reg 2(1). In addition to the persons and bodies listed in Sch 6 para 1 (see PARA 550 note 24), the application must be served on the owner of any land affected by the application, other than the applicant: Sch 6 para 2, Table. Where the application seeks to add land to, or to remove land from, a register, or to correct an error as to the quantification of rights of common in a register, the registration authority must refer it to the Planning Inspectorate for determination: see the Commons Registration (England) Regulations 2008, SI 2008/1961, reg 27(2)(a), (3)(b); and PARA 553. As to the pilot areas in England see PARA 467 text and notes 29-30; as to applications in relation to those areas see generally Pt 3 (regs 15-38); and PARAS 540, 549 et seq; as to the fee to accompany the application see PARA 549 note 11; and as to the service of documents see PARA 532 note 17.

14 Commons Act 2006 s 19(5) (not fully in force).

15 As to the meaning of 'regulations' see PARA 602 note 7.

16 Commons Act 2006 s 19(6) (not fully in force). As to the exercise of this power see note 13.

17 Commons Act 2006 s 19(7)(a) (not fully in force).

18 Commons Act 2006 s 19(7)(b) (not fully in force).

19 See the Commons Act 2006 (Commencement No 4 and Savings) (England) Order 2008, SI 2008/1960, art 2(1)(d); the Commons Act 2006 (Commencement No 1, Transitional Provisions and Savings) (Wales) Order 2007, SI 2007/2386, art 2. As to the pilot areas in England see PARA 467 text and notes 29-30.

20 As to the registers kept under the Commons Registration Act 1965 see PARA 510. See also PARA 528.

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(B) CORRECTION OF NON-REGISTRATION OR MISTAKEN REGISTRATION UNDER THE 1965 ACT

535. Non-registration of common land.

If a commons registration authority¹ is satisfied that any land² not registered as common land or as a town or village green³ is land:

- 254 (1) which was not at any time finally registered as common land or as a town or village green under the Commons Registration Act 1965⁴;
- 255 (2) which is either:
 - 17 20. (a) regulated by an Act made under the Commons Act 1876 confirming a provisional order of the Inclosure Commissioners⁵;
 - 21. (b) subject to a scheme under Metropolitan Commons Act 1866⁶ or the Commons Act 1899⁷;
 - 22. (c) regulated as common land under a local or personal Act; or
 - 23. (d) otherwise recognised or designated as common land by or under an enactment;
- 18 256 (3) to which Part 1 of the Commons Act 2006⁸ applies⁹; and
- 257 (4) which satisfies such other conditions as regulations¹⁰ may specify,

the authority must, subject to the following provisions, register the land as common land in its register of common land¹¹.

A commons registration authority may only register land under these provisions acting on:

- 258 (i) the application¹² of any person made before such date as regulations may specify¹³; or
- 259 (ii) a proposal made and published by the authority before such date as regulations may specify¹⁴.

At the date at which this volume states the law, the above provisions were fully in force only in relation to the pilot areas in England¹⁵. Registers of common land and of town or village greens in other areas of England, and throughout Wales, continue to be kept under the Commons Registration Act 1965¹⁶.

1 As to the commons registration authorities see PARA 507.

2 As to the meaning of 'land' for registration purposes see PARA 403 note 1.

3 As to the meanings of 'land registered as common land' and 'land registered as a town or village green' see PARA 424 notes 7, 12.

4 As to registration under the Commons Registration Act 1965 see PARA 506 et seq.

5 As to such regulation see PARA 586 et seq.

6 As to the Metropolitan Commons Act 1866 see **LONDON GOVERNMENT**.

7 As to schemes under the Commons Act 1899 see PARA 590 et seq.

8 le the Commons Act 2006 Pt 1 (ss 1-25) (not fully in force).

9 As to the land to which the Commons Act 2006 Pt 1 applies see s 5; and PARA 424 note 6. Certain land which was exempted under the Commons Registration Act 1965 s 11 but not under the Commons Act 2006 Pt 1 (see PARA 509) may thus be registered under the provisions set out in the text: see the Explanatory Notes to the Commons Act 2006 para 117.

10 As to the meaning of 'regulations' see PARA 602 note 7.

11 Commons Act 2006 Sch 2 para 2(1), (2) (not fully in force). As to the meaning of 'register of common land' see PARA 424 note 7.

12 In relation to the pilot areas in England, an application made under the Commons Act 2006 Sch 2 (paras 1-10) must include a description of the land to which the application relates: Commons Registration (England) Regulations 2008, SI 2008/1961, Sch 4 para 14(2). In addition to the registration authority's duty to publicise the application under reg 21(1) (see PARA 550), the authority must, as soon as reasonably practicable after receiving the application, (1) publish a notice of the application in such one or more newspapers circulating in the relevant area as appears to the authority to be sufficient to secure adequate publicity; and (2) serve a notice of the application on every other local authority for that area: see reg 21(2)(c), (3). In an application made under the Commons Act 2006 Sch 2 para 2 (see the text and notes 1-11, 13-14) or Sch 2 para 3 (town or village greens: see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 532 et seq), the land to which the application relates may only include land that is covered by a building or which is within the curtilage of a building if the owner of that land consents to its registration: Commons Registration (England) Regulations 2008, SI 2008/1961, Sch 4 para 14(3). An application made under the Commons Act 2006 Sch 2 para 2 must include: (a) evidence of the application of Sch 2, as described in Sch 2 para 2(2) (see heads (1)-(4) in the text), to the land to which the application relates; (b) a copy of any enactment or scheme referred to in Sch 2 para 2(2)(b) (see head (2) in the text), by which the land to which the application relates is regulated, recognised or designated, or to which it is subject; (c) evidence, if applicable, that any consent required under the Commons Registration (England) Regulations 2008, SI 2008/1961, Sch 4 para 14(3) has been given: Sch 4 para 14(4). In addition to the persons and bodies listed in Sch 6 para 1 (see PARA 550 note 24), an application under the Commons Act 2006 Sch 2 to register land not registered, or to deregister land mistakenly registered, under the Commons Registration Act 1965 must be served on the following persons (other than the applicant): (i) the owner of the land to which the application relates; (ii) any occupier or lessee of that land: Commons Registration (England) Regulations 2008, SI 2008/1961, Sch 6 para 2, Table. As to the meaning of 'relevant area' see PARA 534 note 13. As to the pilot areas in England see PARA 467 text and notes 29-30; as to applications in relation to those areas see generally Pt 3 (regs 15-38); and PARAS 540, 549 et seq; as to the fee to accompany the application see PARA 549 note 11; as to the service of documents see PARA 532 note 17; and as to land descriptions see reg 19; and PARA 468 note 7.

13 Commons Act 2006 Sch 2 para 2(3)(a) (not fully in force). In relation to the pilot areas in England, an application made under Sch 2 for the purpose of remedying non-registration or mistaken registration under the Commons Registration Act 1965 must be made on or before 31 December 2020: Commons Registration (England) Regulations 2008, SI 2008/1961, Sch 4 para 14(1).

14 Commons Act 2006 Sch 2 para 2(3)(a) (not fully in force). In relation to the pilot areas in England, before taking any other steps under the Commons Registration (England) Regulations 2008, SI 2008/1961, Pt 3 in relation to a proposal, a registration authority must prepare a statement in writing describing the proposal and explaining the justification for it: reg 18(1). A registration authority may not proceed with a proposal under the Commons Act 2006 Sch 2 unless it has complied with the Commons Registration (England) Regulations 2008, SI 2008/1961, reg 18(1), and with reg 23(2)-(5) (publicity: see PARA 551), on or before 31 December 2020: reg 18(2). As to the meaning of 'proposal' see PARA 507 note 11.

15 See the Commons Act 2006 (Commencement No 4 and Savings) (England) Order 2008, SI 2008/1960, art 2(1)(f); the Commons Act 2006 (Commencement No 1, Transitional Provisions and Savings) (Wales) Order 2007, SI 2007/2386, art 2. As to the pilot areas in England see PARA 467 text and notes 29-30.

16 As to the registers kept under the Commons Registration Act 1965 see PARA 510. See also PARA 528.

UPDATE

535 Non-registration of common land

NOTE 12--SI 2008/1961 Sch 6 para 2, Table amended: SI 2009/2018.

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536. Waste land of a manor not registered as common land.

If a commons registration authority¹ is satisfied that any land² not registered as common land or as a town or village green³ is land which at the time of the application under these provisions⁴ is waste land of a manor⁵ and where, before the commencement of these provisions⁶:

- 260 (1) the land was provisionally registered as common land⁷ under the Commons Registration Act 1965⁸;
- 261 (2) an objection was made in relation to the provisional registration; and
- 262 (3) the provisional registration was cancelled in the circumstances specified in head (a), head (b) or head (c) below,

the authority must, subject to the following provisions, register the land as common land in its register of common land⁹. The circumstances referred to in head (3) above are that:

- 263 (a) the provisional registration was referred to a Commons Commissioner¹⁰ who determined that, although the land had been waste land of a manor at some earlier time, it was not such land at the time of the determination because it had ceased to be connected with the manor¹¹ and for that reason only the Commissioner refused to confirm the provisional registration¹²;
- 264 (b) the provisional registration was referred to a Commons Commissioner¹³ who determined that the land was not subject to rights of common¹⁴ and for that reason refused to confirm the provisional registration, without considering whether the land was waste land of a manor¹⁵;
- 265 (c) the person on whose application the provisional registration was made requested or agreed to its cancellation¹⁶, whether before or after its referral to a Commons Commissioner¹⁷.

A commons registration authority may only register land under the above provisions acting on:

- 266 (i) the application¹⁸ of any person made before such date as regulations¹⁹ may specify²⁰; or
- 267 (ii) a proposal made and published by the authority before such date as regulations may specify²¹.

At the date at which this volume states the law, the above provisions were fully in force only in relation to the pilot areas in England²². Registers of common land and of town or village greens in other areas of England, and throughout Wales, continue to be kept under the Commons Registration Act 1965²³.

1 As to the commons registration authorities see PARA 507.

2 As to the meaning of 'land' for registration purposes see PARA 403 note 1.

3 As to the meanings of 'land registered as common land' and 'land registered as a town or village green' see PARA 424 notes 7, 12.

4 Ie the application under the Commons Act 2006 Sch 2 para 4: see the text and notes 18-21.

5 Waste land of a manor not subject to rights of common was registrable as common land under the Commons Registration Act 1965: see PARA 407. Land may still be waste of a manor and registrable as common land although not being used as such, if it could easily revert: see *Re Yateley Common, Hampshire, Arnold v Dodd* [1977] 1 All ER 505, [1977] 1 WLR 840 (land being used as an aerodrome). Land which was formerly waste land of a manor was held to be registrable although no longer owned by the lord of the manor in *Re Yateley Common* [1977] 1 All ER 505, [1977] 1 WLR 840 (obiter) and in *Re Chewton Common, Christchurch, Borough of Christchurch v Milligan* [1977] 3 All ER 509, [1977] 1 WLR 1242; but not in *Re Box Hill Common, Box Parish Council v Lacy* [1980] Ch 109, [1979] 1 All ER 113, CA; *Re Britford Common* [1977] 1 All ER 532, [1977] 1 WLR 39. See now, however, *Hampshire County Council v Milburn* [1991] 1 AC 325, [1990] 2 All ER 257, HL, and *Lewis v Mid Glamorgan County Council* [1995] 1 All ER 760, [1995] 1 WLR 313, HL ('waste land of a manor' includes waste land both belonging and formerly belonging to the manor, so that such land does not cease to be registrable where the ownership of the lordship of the manor is severed from the ownership of the waste land).

6 Ie the commencement of the Commons Act 2006 Sch 2 para 4 (not fully in force). Schedule 2 para 4 came into force in relation to the pilot areas in England on 1 October 2008 (see the Commons Act 2006 (Commencement No 4 and Savings) (England) Order 2008, SI 2008/1960, art 2(1)(f)); the Commons Act 2006 Sch 2 para 4(6) came into force on 12 August 2007 only in so far as it confers a power or imposes a duty on the Welsh Ministers to make, or make provision by, regulations (see the Commons Act 2006 (Commencement No 1, Transitional Provisions and Savings) (Wales) Order 2007, SI 2007/2386, art 2(1)(a), (2)). As to the pilot areas in England see PARA 467 text and notes 29-30.

7 As to the meaning of 'common land' for registration purposes see PARA 407.

8 As to provisional registration under the Commons Registration Act 1965 see PARA 508.

9 Commons Act 2006 Sch 2 para 4(1), (2) (not fully in force). As to the meaning of 'register of common land' see PARA 424 note 7.

Note that where land is registered under Sch 2 para 4, it will not be possible to claim or register any rights of common which were formerly exercisable over that land, since such rights were extinguished for want of registration under the Commons Registration Act 1965 s 1(2)(b) (see PARA 403); however, registration as common land is important for other reasons such as the public right of access under the Countryside and Rights of Way Act 2000 Pt I (ss 1-46) (see PARAS 401, 580; and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 578 et seq). As to the creation of new rights of common see PARA 467.

10 Ie under the Commons Registration Act 1965 s 5: see PARA 508.

11 Following the judgment in *Re Box Hill Common, Box Parish Council v Lacy* [1980] Ch 109, [1979] 1 All ER 113, CA, that waste land of the manor must still be in the ownership of the lord of the manor (see note 5), many provisional registrations of common land were cancelled by the Commons Commissioner solely on those grounds, or were withdrawn by the applicant for registration in anticipation of cancellation: see the Explanatory Notes to the Commons Act 2006 para 120. That decision was overruled by the House of Lords in *Hampshire County Council v Milburn* [1991] 1 AC 325, [1990] 2 All ER 257, HL and *Lewis v Mid Glamorgan County Council* [1995] 1 All ER 760, [1995] 1 WLR 313, HL (see note 5), by which time many of those provisional registrations were out of time or ineligible for appeal.

12 See the Commons Act 2006 Sch 2 para 4(3) (not fully in force).

13 See note 10.

14 As to the meaning of 'right of common' see PARA 405.

15 See the Commons Act 2006 Sch 2 para 4(4) (not fully in force). Where none of the parties appearing before the Commissioner argued that the land might also qualify as waste land, the Commissioner often concluded that the registration should fail without further consideration. However, there is some authority to support the view that the Commissioner ought to have examined the evidence before coming to a decision in such cases, since there is a public interest aspect to the registration of common land and whether land should or should not be registered should not be treated solely as a matter of dispute between the parties to the application: see *President and Scholars of Corpus Christi College, Oxford v Gloucestershire County Council* [1983] QB 360 at 367, [1982] 3 All ER 995 at 1000, CA, per Lord Denning MR.

16 As to decisions by consent see the Commons Commissioners Regulations 1971, SI 1971/1727, reg 31.

17 See the Commons Act 2006 Sch 2 para 4(5) (not fully in force).

18 In relation to the pilot areas in England, an application made under the Commons Act 2006 Sch 2 para 4 must include evidence of the application of Sch 2 para 4, as described in Sch 2 para 4(2) (see heads (1)-(3) in the text), to the land to which the application relates: Commons Registration (England) Regulations 2008, SI 2008/1961, Sch 4 para 14(6). Where the application seeks to add land to, or to remove land from, a register, the registration authority must refer it to the Planning Inspectorate for determination: see reg 27(2)(a), (3)(c); and PARA 553. As to the meaning of 'the Planning Inspectorate' see PARA 522 note 19. As to applications under the Commons Act 2006 Sch 2 in relation to those areas see further PARA 535 note 12; as to the pilot areas in England see PARA 467 text and notes 29-30; and as to applications in relation to those areas see generally the Commons Registration (England) Regulations 2008, SI 2008/1961, Pt 3 (regs 15-38); and PARAS 540, 549 et seq.

19 As to the meaning of 'regulations' see PARA 602 note 7.

20 Commons Act 2006 Sch 2 para 4(6)(a) (not fully in force). The specified date in relation to the pilot areas in England is 31 December 2020: see PARA 535 note 13.

21 Commons Act 2006 Sch 2 para 4(6)(b) (not fully in force). In relation to the pilot areas in England, the authority must have complied with prescribed requirements about the proposal and publicity for the proposal before 31 December 2020: see PARA 535 note 14. Where the proposal seeks to add land to, or to remove land from, a register, the registration authority must refer it to the Planning Inspectorate for determination: see reg 27(2)(b), (3)(c); and PARA 553.

22 See note 6.

23 As to the registers kept under the Commons Registration Act 1965 see PARA 510. See also PARA 528.

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537. Town or village green wrongly registered as common land.

If a commons registration authority¹ is satisfied that any land registered as common land² is land³ which was provisionally⁴ and finally registered as common land⁵ under the Commons Registration Act 1965⁶ but that immediately before its provisional registration, the land was a town or village green⁷ within the meaning of that Act as originally enacted, the authority must, subject to the following provisions, remove the land from its register of common land⁸ and register it in its register of town or village greens⁹.

A commons registration authority may only remove and register land under these provisions acting on:

- 268 (1) the application¹⁰ of any person made before such date as regulations¹¹ may specify¹²; or
- 269 (2) a proposal made and published by the authority before such date as regulations may specify¹³.

At the date at which this volume states the law, the above provisions were fully in force only in relation to the pilot areas in England¹⁴. Registers of common land and of town or village greens in other areas of England, and throughout Wales, continue to be kept under the Commons Registration Act 1965¹⁵.

1 As to the commons registration authorities see PARA 507.

2 As to the meaning of 'land registered as common land' see PARA 424 note 7.

3 As to the meaning of 'land' for registration purposes see PARA 403 note 1.

4 Ie under the Commons Registration Act 1965 s 4: see PARA 508.

5 As to the meaning of 'common land' for these purposes see PARA 407.

6 As to registration under the Commons Registration Act 1965 see PARA 506 et seq.

7 As to town and village greens see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 532 et seq.

8 As to the meaning of 'register of common land' see PARA 424 note 7.

9 See the Commons Act 2006 Sch 2 para 5(1), (2) (not fully in force). As to the meaning of 'register of common land' see PARA 424 note 12.

10 In relation to the pilot areas in England, an application made under the Commons Act 2006 Sch 2 para 5 must include evidence of the application of Sch 2 para 5, as described in Sch 2 para 5(2), to the land to which the application relates: Commons Registration (England) Regulations 2008, SI 2008/1961, Sch 4 para 14(6). Where the application seeks to add land to, or to remove land from, a register, the registration authority must refer it to the Planning Inspectorate for determination: see reg 27(2)(a), (3)(c); and PARA 553. As to the meaning of 'the Planning Inspectorate' see PARA 522 note 19. As to applications under the Commons Act 2006 Sch 2 in relation to those areas see further PARA 535 note 12; as to the pilot areas in England see PARA 467 text and notes 29-30; and as to applications in relation to those areas see generally the Commons Registration (England) Regulations 2008, SI 2008/1961, Pt 3 (regs 15-38); and PARAS 540, 549 et seq.

11 As to the meaning of 'regulations' see PARA 602 note 7.

12 Commons Act 2006 Sch 2 para 4(3)(a) (not fully in force). The specified date in relation to the pilot areas in England is 31 December 2020: see PARA 535 note 13.

13 Commons Act 2006 Sch 2 para 5(3)(b) (not fully in force). In relation to the pilot areas in England, the authority must have complied with prescribed requirements about the proposal and publicity for the proposal before 31 December 2020: see PARA 535 note 14. Where the proposal seeks to add land to, or to remove land from, a register, the registration authority must refer it to the Planning Inspectorate for determination: see reg 27(2)(b), (3)(c); and PARA 553.

14 See the Commons Act 2006 (Commencement No 4 and Savings) (England) Order 2008, SI 2008/1960, art 2(1)(f); the Commons Act 2006 (Commencement No 1, Transitional Provisions and Savings) (Wales) Order 2007, SI 2007/2386, art 2. As to the pilot areas in England see PARA 467 text and notes 29-30.

15 As to the registers kept under the Commons Registration Act 1965 see PARA 510. See also PARA 528.

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538. Buildings registered as common land.

If a commons registration authority¹ is satisfied that any land registered as common land² is land³ which was provisionally⁴ and finally registered as common land⁵ under the Commons Registration Act 1965⁶ but that on the date of the provisional registration the land was covered by a building or was within the curtilage of a building⁷, and that since the date of the provisional registration the land has at all times been, and still is, covered by a building or within the curtilage of a building, the authority must, subject to the following provisions, remove that land from its register of common land⁸.

A commons registration authority may only remove land under these provisions acting on:

- 270 (1) the application⁹ of any person made before such date as regulations¹⁰ may specify¹¹; or
- 271 (2) a proposal made and published by the authority before such date as regulations may specify¹².

At the date at which this volume states the law, the above provisions were fully in force only in relation to the pilot areas in England¹³. Registers of common land and of town or village greens in other areas of England, and throughout Wales, continue to be kept under the Commons Registration Act 1965¹⁴.

1 As to the commons registration authorities see PARA 507.

2 As to the meaning of 'land registered as common land' see PARA 424 note 7.

3 As to the meaning of 'land' for registration purposes see PARA 403 note 1.

4 I.e. under the Commons Registration Act 1965 s 4: see PARA 508.

5 As to the meaning of 'common land' for these purposes see PARA 407.

6 As to registration under the Commons Registration Act 1965 see PARA 506 et seq.

7 As to the meaning of 'curtilage' in the context of town and country planning see **TOWN AND COUNTRY PLANNING** vol 46(1) (Reissue) PARA 223 note 13.

8 See the Commons Act 2006 Sch 2 para 6(1), (2) (not fully in force). As to the meaning of 'register of common land' see PARA 424 note 7.

Similar provision was made by the Common Land (Rectification of Registers) Act 1989 s 1 (repealed). The opportunity to make an application under that Act expired on 21 July 1992.

9 In relation to the pilot areas in England, an application made under the Commons Act 2006 Sch 2 para 6 must include evidence of the application of Sch 2 para 6, as described in Sch 2 para 6(2), to the land to which the application relates: Commons Registration (England) Regulations 2008, SI 2008/1961, Sch 4 para 14(6). Where the application seeks to add land to, or to remove land from, a register, the registration authority must refer it to the Planning Inspectorate for determination: see reg 27(2)(a), (3)(c); and PARA 553. As to the meaning of 'the Planning Inspectorate' see PARA 522 note 19. As to applications under the Commons Act 2006 Sch 2 in relation to those areas see further PARA 535 note 12; as to the pilot areas in England see PARA 467 text and notes 29-30; and as to applications in relation to those areas see generally the Commons Registration (England) Regulations 2008, SI 2008/1961, Pt 3 (regs 15-38); and PARAS 540, 549 et seq.

10 As to the meaning of 'regulations' see PARA 602 note 7.

11 Commons Act 2006 Sch 2 para 6(3)(a) (not fully in force). The specified date in relation to the pilot areas in England is 31 December 2020: see PARA 535 note 13.

12 Commons Act 2006 Sch 2 para 6(3)(b) (not fully in force). In relation to the pilot areas in England, the authority must have complied with prescribed requirements about the proposal and publicity for the proposal before 31 December 2020: see PARA 535 note 14. Where the proposal seeks to add land to, or to remove land from, a register, the registration authority must refer it to the Planning Inspectorate for determination: see reg 27(2)(b), (3)(c); and PARA 553.

13 See the Commons Act 2006 (Commencement No 4 and Savings) (England) Order 2008, SI 2008/1960, art 2(1)(f); the Commons Act 2006 (Commencement No 1, Transitional Provisions and Savings) (Wales) Order 2007, SI 2007/2386, art 2. As to the pilot areas in England see PARA 467 text and notes 29-30.

14 As to the registers kept under the Commons Registration Act 1965 see PARA 510. See also PARA 528.

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539. Other land wrongly registered as common land.

If a commons registration authority¹ is satisfied that any land registered as common land² is land³ which was provisionally⁴ and finally registered as common land⁵ under the Commons Registration Act 1965⁶ without the provisional registration of the land as common land having been referred to a Commons Commissioner⁷, and that immediately before its provisional registration the land was not any of the following, namely:

- 272 (1) land subject to rights of common⁸;
- 273 (2) waste land of a manor⁹;
- 274 (3) a town or village green within the meaning of the Commons Registration Act 1965 as originally enacted¹⁰; or
- 275 (4) land of a description specified as subject to inclosure under the Inclosure Act 1845¹¹,

the authority must, subject to the following provisions, remove the land from its register of common land¹².

A commons registration authority may only remove land under these provisions acting on:

- 276 (a) the application¹³ of any person made before such date as regulations¹⁴ may specify¹⁵; or
- 277 (b) a proposal made and published by the authority before such date as regulations may specify¹⁶.

At the date at which this volume states the law, the above provisions were fully in force only in relation to the pilot areas in England¹⁷. Registers of common land and of town or village greens in other areas of England, and throughout Wales, continue to be kept under the Commons Registration Act 1965¹⁸.

1 As to the commons registration authorities see PARA 507.

2 As to the meaning of 'land registered as common land' see PARA 424 note 7.

3 As to the meaning of 'land' for registration purposes see PARA 403 note 1.

4 Ie under the Commons Registration Act 1965 s 4: see PARA 508.

5 As to the meaning of 'common land' for these purposes see PARA 407.

6 As to registration under the Commons Registration Act 1965 see PARA 506 et seq.

7 Ie under the Commons Registration Act 1965 s 5: see PARA 508. Where a hearing has been held before a Commissioner with regard to the registration of the land, no application or proposal under the Commons Act 2006 Sch 2 para 7 (see the text and notes 1-6, 8-16) may be made; but an application or proposal under Sch 2 para 7 is not precluded merely because a hearing was held which considered only the registration of rights over the land, or because a hearing into the ownership of the land was held under the Commons Registration Act 1965 s 8 (repealed): see the Explanatory Notes to the Commons Act 2006 para 130.

8 As to the meaning of 'rights of common' see PARA 405.

9 As to waste land of a manor see PARA 407 note 12; see also PARA 536.

10 As to town and village greens see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 532 et seq.

11 The land of a description specified in the Inclosure Act 1845 s 11: see PARA 419. The exclusion for these purposes of land subject to inclosure under s 11 ensures that land cannot be removed from the registers under the Commons Act 2006 Sch 2 para 7 if, at the time of its registration, it was eg a regulated pasture. Regulated pastures are lands which are owned in common by several persons, who also use the land in common at certain or all times of the year (eg, the land may be used to graze in common the stock of all the owners). A number of regulated pastures were incorrectly registered under the Commons Registration Act 1965, but the continuing registration of such land is not thought to give rise to any difficulties, and confers some benefits in terms of security of status, and public rights of access: see the Explanatory Notes to the Commons Act 2006 para 131.

12 See the Commons Act 2006 Sch 2 para 7(1), (3) (not fully in force). For an example of a case where land not falling within heads (1)-(4) in the text was mistakenly registered by a commons registration authority as common land see *G & K Ladenbau (UK) Ltd v Crawley & de Reya (a firm)* [1978] 1 All ER 682, [1978] 1 WLR 266 (land registered as common land on the basis of an incorrect plan submitted with the application).

13 In relation to the pilot areas in England, an application made under the Commons Act 2006 Sch 2 para 7 must include evidence of the application of Sch 2 para 7, as described in Sch 2 para 7(2), to the land to which the application relates: Commons Registration (England) Regulations 2008, SI 2008/1961, Sch 4 para 14(6). Where the application seeks to add land to, or to remove land from, a register, the registration authority must refer it to the Planning Inspectorate for determination: see reg 27(2)(a), (3)(c); and PARA 553. As to the meaning of 'the Planning Inspectorate' see PARA 522 note 19. As to applications under the Commons Act 2006 Sch 2 in relation to those areas see further PARA 535 note 12; as to the pilot areas in England see PARA 467 text and notes 29-30; and as to applications in relation to those areas see generally the Commons Registration (England) Regulations 2008, SI 2008/1961, Pt 3 (regs 15-38); and PARAS 540, 549 et seq.

14 As to the meaning of 'regulations' see PARA 602 note 7.

15 Commons Act 2006 Sch 2 para 7(3)(a) (not fully in force). The specified date in relation to the pilot areas in England is 31 December 2020: see PARA 535 note 13.

16 Commons Act 2006 Sch 2 para 7(3)(b) (not fully in force). In relation to the pilot areas in England, the authority must have complied with prescribed requirements about the proposal and publicity for the proposal before 31 December 2020: see PARA 535 note 14. Where the proposal seeks to add land to, or to remove land from, a register, the registration authority must refer it to the Planning Inspectorate for determination: see reg 27(2)(b), (3)(c); and PARA 553.

17 See the Commons Act 2006 (Commencement No 4 and Savings) (England) Order 2008, SI 2008/1960, art 2(1)(f); the Commons Act 2006 (Commencement No 1, Transitional Provisions and Savings) (Wales) Order 2007, SI 2007/2386, art 2. As to the pilot areas in England see PARA 467 text and notes 29-30.

18 As to the registers kept under the Commons Registration Act 1965 see PARA 510. See also PARA 528.

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540. Costs.

Regulations¹ may make provision as to the payment of costs which pursuant to an application for the correction of non-registration or mistaken registration² are incurred by the applicant, an objector or the person determining the application³. That provision may in particular include provision:

- 278 (1) for the payment of costs by the applicant, an objector or a commons registration authority⁴;
- 279 (2) for the person determining an application or the appropriate national authority⁵ to determine who is liable to pay costs and how much they are liable to pay⁶.

At the date at which this volume states the law, the above provisions were fully in force only in relation to the pilot areas in England⁷. Registers of common land and of town or village greens in other areas of England, and throughout Wales, continue to be kept under the Commons Registration Act 1965⁸.

In relation to the pilot areas in England, where the application is referred to the Planning Inspectorate⁹ and a public inquiry¹⁰ is held in relation to the application, the inspector¹¹ conducting the public inquiry may make an order for costs against any of the persons specified in heads (a) to (c) below, requiring the payment to the applicant or to any objector taking part in the public inquiry, as may be specified in the order, of such amount as the inspector may determine in respect of costs reasonably incurred by that person pursuant to the application¹². The persons who may be ordered to pay costs are:

- 280 (a) the applicant;
- 281 (b) any objector taking part in the public inquiry; or
- 282 (c) any registration authority taking part in the public inquiry¹³.

1 As to the meaning of 'regulations' see PARA 602 note 7.

2 I.e. an application under the Commons Act 2006 Sch 2: see PARAS 535-539.

3 Commons Act 2006 Sch 2 para 10(1) (not fully in force).

4 Commons Act 2006 Sch 2 para 10(2)(a) (not fully in force).

5 As to the meaning of 'appropriate national authority' see PARA 411 note 1.

6 Commons Act 2006 Sch 2 para 10(2)(b) (not fully in force).

7 See the Commons Act 2006 (Commencement No 4 and Savings) (England) Order 2008, SI 2008/1960, art 2(1)(f); the Commons Act 2006 (Commencement No 1, Transitional Provisions and Savings) (Wales) Order 2007, SI 2007/2386, art 2. As to the pilot areas in England see PARA 467 text and notes 29-30.

8 As to the registers kept under the Commons Registration Act 1965 see PARA 510. See also PARA 528.

9 As to the meaning of 'the Planning Inspectorate' see PARA 522 note 19.

10 As to public inquiries see PARA 554.

11 For these purposes, 'inspector' means a person appointed by the determining authority to conduct a public inquiry, hearing or site inspection in relation to an application or proposal: Commons Registration (England) Regulations 2008, SI 2008/1961, reg 2(1). As to the meanings of 'application' and 'proposal' see PARA 507 notes 10, 11; and as to the meaning of 'the determining authority' see PARA 522 note 19.

12 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 38(1), (2), (4).

13 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 38(3).

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(C) TRANSITIONAL PERIOD FOR UPDATING REGISTERS

541. Transitional period for updating registers in consequence of qualifying events.

Regulations¹ may make provision for commons registration authorities², during a period specified in the regulations ('the transitional period')³, to amend their registers of common land and town or village greens⁴ in consequence of qualifying events which were not registered under the Commons Registration Act 1965⁵. The following are qualifying events for these purposes:

- 283 (1) the creation of a right of common (by any means, including prescription)⁶, where occurring in relation to land⁷ to which Part 1 of the Commons Act 2006⁸ applies⁹ at any time after 2 January 1970¹⁰ and before the commencement of the relevant statutory provision¹¹;
- 284 (2) any relevant disposition¹² in relation to a right of common¹³ registered under the 1965 Act, or any extinguishment of such a right, where occurring at any time after the date of the registration of the right under that Act and before the commencement of the relevant statutory provision¹⁴;
- 285 (3) a disposition occurring before the commencement of the relevant statutory provision¹⁵ by virtue of any relevant instrument¹⁶ in relation to land which at the time of the disposition was registered as common land or a town or village green under the 1965 Act¹⁷;
- 286 (4) the giving of land in exchange for any land subject to a disposition referred to in head (3) above¹⁸.

Regulations under these provisions may include provision for commons registration authorities to amend their registers as specified above either:

- 287 (a) on the application¹⁹ of a person specified in the regulations; or
- 288 (b) on their own initiative²⁰,

and regulations under head (b) above may include provision requiring a commons registration authority to take steps to discover information relating to qualifying events, including in particular requiring an authority to:

- 289 (i) carry out a review of information already contained in a register of common land or town or village greens²¹;
- 290 (ii) publicise the review²²;
- 291 (iii) invite persons to supply information for, or to apply for amendment of, the register²³.

At the end of the transitional period, any right of common which is not registered in a register of common land or town or village greens, but which was capable of being so registered under the above provisions, is²⁴ at that time extinguished²⁵.

At the date at which this volume states the law, the above provisions were fully in force only in relation to the pilot areas in England²⁶. Registers of common land and of town or village greens in other areas of England, and throughout Wales, continue to be kept under the Commons Registration Act 1965²⁷. By the end of the transitional period in relation to the pilot areas²⁸, the determining authority²⁹ must determine any application for the above purposes³⁰ which was made to the registration authority during the transitional application period³¹ and any proposal by the registration authority to amend its registers on its own initiative³². The registration authority in those areas must make any amendment to its registers which is required in consequence of such a determination³³.

1 As to the meaning of 'regulations' see PARA 602 note 7.

2 As to the commons registration authorities see PARA 507.

3 In relation to the pilot areas in England, the transitional period for the purposes of the Commons Act 2006 Sch 3 paras 2-5 (see the text and notes 3-25; and PARA 542) is the period from 1 October 2008 to 30 September 2010: Commons Registration (England) Regulations 2008, SI 2008/1961, reg 39(1). Every registration authority in the pilot areas must, as soon as reasonably practicable after 1 October 2008, publicise the transitional period in its area by (1) placing a notice of the transitional period on its website; (2) publishing a notice of the transitional period in such one or more newspapers as appears to the registration authority to be sufficient to secure adequate publicity; and (3) serving notice of the transitional period on (a) every other local authority in its area; (b) any body appearing to it to be representative of persons entitled to exercise rights of common on any registered land in its area; and (c) such other persons as the registration authority thinks fit: reg 40(1). As to the contents of the notice see reg 40(2). As to the pilot areas in England see PARA 467 text and notes 29-30.

4 As to the meanings of 'register of common land' and 'register of town or village greens' see PARA 424 notes 7, 12.

5 Commons Act 2006 Sch 3 paras 1, 2(1) (not fully in force).

6 As to the creation of rights of common see PARA 467 et seq. The Commons Act 2006 prohibits the creation of new rights of common by prescription: see PARA 467.

7 As to the meaning of 'land' for registration purposes see PARA 403 note 1.

8 I.e. the Commons Act 2006 Pt 1 (ss 1-25) (not fully in force).

9 As to the land to which the Commons Act 2006 Pt 1 applies see s 5; and PARA 424 note 6.

10 2 January 1970 was the closing date for applications for registration under the Commons Registration Act 1965: see PARA 506.

11 Commons Act 2006 Sch 3 para 2(2)(a) (not fully in force). The commencement date referred to in the text is the commencement of Sch 3 para 2. Schedule 3 para 2 came into force in relation to the pilot areas in England on 1 October 2008 (see the Commons Act 2006 (Commencement No 4 and Savings) (England) Order 2008, SI 2008/1960, art 2(1)(g)); the Commons Act 2006 Sch 3 para 2(1), (5), (6) came into force in relation to Wales on 12 August 2007 only in so far as it confers a power or imposes a duty on the Welsh Ministers to make, or make provision by, regulations, or to make provision with respect to the exercise of any such power or performance of such duty (see the Commons Act 2006 (Commencement No 1, Transitional Provisions and Savings) (Wales) Order 2007, SI 2007/2386, art 2(1)(a), (c), (2)). As to the pilot areas in England see PARA 467 text and notes 29-30.

In relation to the pilot areas in England, an application to amend a register in consequence of the creation of a right of common which is a qualifying event by virtue of the Commons Act 2006 Sch 3 para 2(2)(a) may only be made by: (1) the owner of any part of the land over which the right of common is exercisable; (2) if the right of common is attached to land, the owner of any part of that land; or (3) if the right of common is not attached to land, the owner of the right of common: Commons Registration (England) Regulations 2008, SI 2008/1961, Sch 4 para 15(1). As to the contents of the application see Sch 4 para 15(2); and as to the materials which must accompany the application see Sch 4 para 15(3). As to the transitional period for applications see note 19; and as to applications in relation to the pilot areas see generally Pt 3 (regs 15-38); and PARAS 540, 549 et seq. In addition to the persons and bodies listed in Sch 6 para 1 (see PARA 550 note 24), the application must be served on the following persons (other than the applicant): (a) the owner of the land over which the right of common is or will be exercisable; (b) the owner of the land to which the right of common is or will be attached, or the owner of the right of common in gross, as the case may be: Sch 6 para 2, Table. As to the meaning of 'right of common in gross' see PARA 468 note 3; and as to the service of documents see PARA 532 note 17.

12 For these purposes, 'relevant disposition' means (1) the surrender of a right of common; (2) the variation of a right of common; (3) in the case of a right of common attached to land, the apportionment or severance of the right; (4) in the case of a right not attached to land, the transfer of the right: Commons Act 2006 Sch 3 para 2(3) (not fully in force). Regulations under Sch 3 para 2 may in particular include provision as to what is or is not to be regarded as severance of a right of common for the purposes of those regulations: Sch 3 para 5 (not fully in force). In relation to the pilot areas in England, the following provision applies for the purposes of determining an application or proposal made for the purposes of Sch 3 to amend a register to record the severance of a right of common from land to which it was attached: Commons Registration (England) Regulations 2008, SI 2008/1961, reg 42(2). A right of common attached to land is not to be treated as having been severed from that land in consequence of a qualifying event, unless the determining authority is satisfied that the severance was lawful and (a) there is documentary evidence showing that the parties to the transaction or disposition which is a qualifying event intended the transaction or disposition to have the effect of severing the right of common; or (b) there is evidence that the right of common has been treated since the qualifying event as having been severed: reg 42(3). As to severance see further PARA 498 et seq.

13 As to the meaning of 'right of common' see PARA 405.

14 Commons Act 2006 Sch 3 para 2(2)(b) (not fully in force); and see note 11.

In relation to the pilot areas in England, the Commons Registration (England) Regulations 2008, SI 2008/1961, Sch 4 paras 16-20 make detailed provision with regard to an application to amend a register in consequence of (1) a surrender or extinguishment of a right of common (see the Commons Registration (England) Regulations 2008, SI 2008/1961, Sch 4 para 16); (2) a variation of a right of common (see Sch 4 para 17); (3) an apportionment of a right of common which is attached to land (see Sch 4 para 18); (4) the severance of a right of common from land to which it was attached (see Sch 4 para 19); and (5) the transfer of a right of common in gross (see Sch 4 para 20) which is, in each case, a qualifying event by virtue of the Commons Act 2006 Sch 3 para 2(2)(b) (see head (2) in the text). As to the persons by whom such an application may be made see the Commons Registration (England) Regulations 2008, SI 2008/1961, Sch 4 paras 16(1), 17(1), 18(1), (2), 19(1), 20(1); as to the contents of such applications see Sch 4 paras 15(2), 16(2), 17(2), 18(3), (4)(a), 19(2), (3); as to the materials which must or may accompany such applications see Sch 4 paras 15(3), 16(3), 17(3), 18(4)(b), 19(3); and as to the additional persons on whom the application must be served see Sch 6 para 2, Table. As to the transitional period for applications see note 19; as to applications in relation to the pilot areas see generally Pt 3 (regs 15-38); and PARAS 540, 549 et seq; as to the fee to accompany the application see PARA 549 note 11; as to the meaning of 'right of common in gross' see PARA 468 note 3.

15 See note 11.

16 For these purposes, 'relevant instrument' means (1) any order, deed or other instrument made under or pursuant to the Acquisition of Land Act 1981 (see PARA 481); (2) a conveyance made for the purposes of the New Parishes Measure 1943 s 13 (see PARA 477; and **ECCLESIASTICAL LAW**); (3) any other instrument made under or pursuant to any enactment: Commons Act 2006 Sch 3 para 2(4) (not fully in force).

17 Commons Act 2006 Sch 3 para 2(2)(c) (not fully in force). In relation to the pilot areas in England, an application may be made by any person to amend a register in consequence of (1) a disposition by virtue of any relevant instrument, which is a qualifying event by virtue of Sch 3 para 2(2)(c); or (2) the giving of land in exchange for any land subject to such a disposition, which is a qualifying event by virtue of Sch 3 para 2(2)(d): Commons Registration (England) Regulations 2008, SI 2008/1961, Sch 4 para 21(1). As to the contents of the application see Sch 4 para 21(2). In addition to the persons and bodies listed in Sch 6 para 1 (see PARA 550 note 24), the application must be served on the following persons (other than the applicant), namely the owner of any land affected by the disposition: Sch 6 para 2, Table. As to the transitional period for applications see note 19; and as to applications in relation to the pilot areas see generally Pt 3 (regs 15-38); and PARAS 540, 549 et seq.

18 Commons Act 2006 Sch 3 para 2(2)(d) (not fully in force).

19 In relation to the pilot areas in England, applications may be made to a registration authority for the purposes of the Commons Act 2006 Sch 3 para 2, without payment of a fee, for its registers to be amended during the transitional period, during the period referred to as 'the transitional application period', which is the period from 1 October 2008 to 30 September 2009: see the Commons Registration (England) Regulations 2008, SI 2008/1961, reg 39(2), (3).

20 Commons Act 2006 Sch 3 para 2(5) (not fully in force). As to the persons who may make an application under Sch 3 para 2 see notes 11, 14, 17.

In relation to the pilot areas in England, before taking any other steps under the Commons Registration (England) Regulations 2008, SI 2008/1961, Pt 3 (regs 15-38) (applications and proposals: see PARAS 540, 549 et seq) in relation to a proposal, a registration authority must prepare a statement in writing describing the proposal and explaining the justification for it: reg 18(1). A registration authority may not proceed with a

proposal for the purposes of the Commons Act 2006 Sch 3 para 2 unless it has complied with the Commons Registration (England) Regulations 2008, SI 2008/1961, reg 18(1), and with reg 23(2)-(5) (inspection of copies of documents: see PARA 551), on or before 30 September 2009: reg 18(3).

21 Commons Act 2006 Sch 3 para 2(6)(a) (not fully in force). Every registration authority in the pilot areas in England must, during the period 1 October 2008 to 30 September 2009 (1) carry out a review of the information contained in its register of common land and its register of town or village greens; (2) consider whether to make any proposals to amend its registers on its own initiative in consequence of qualifying events; and (3) in relation to any proposal which it decides to make (a) prepare a statement of the proposal in accordance with the Commons Registration (England) Regulations 2008, SI 2008/1961, reg 18(1) (see note 20); and (b) publicise the proposal in accordance with reg 23 (see PARA 551): reg 41.

22 Commons Act 2006 Sch 3 para 2(6)(b) (not fully in force).

23 Commons Act 2006 Sch 3 para 2(6)(c) (not fully in force).

24 Ie by virtue of the Commons Act Sch 3 para 3.

25 Commons Act 2006 Sch 3 para 3 (not fully in force).

26 See note 11.

27 As to the registers kept under the Commons Registration Act 1965 see PARA 510. See also PARA 528.

28 See note 3.

29 As to the meaning of 'determining authority' see PARA 522 note 19.

30 Ie for the purposes of the Commons Act 2006 Sch 3 para 2.

31 As to the transitional application period see note 19.

32 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 42(1)(a).

33 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 42(1)(b).

UPDATE

541 Transitional period for updating registers in consequence of qualifying events

NOTES 3, 14, 19, 20, 21--SI 2008/1961 regs 18(3), 39(1), (3), 41, Sch 4 para 18 amended: SI 2009/2018.

TEXT AND NOTE 32--SI 2008/1961 reg 42(1)(a) amended: SI 2009/2018.

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542. Amendment of registers after the end of the transitional period in consequence of qualifying events.

Regulations¹ may make provision for commons registration authorities² to amend their registers of common land or town or village greens³ after the end of the transitional period⁴, in circumstances specified in the regulations, in consequence of qualifying events⁵. Such regulations may provide that the statutory provision whereby any right of common⁶ capable of registration, but not registered at the end of the transitional period, is extinguished⁷ is to be treated as not having applied to any right of common which is registered pursuant to the regulations⁸.

At the date at which this volume states the law, the above provisions were fully in force only in relation to the pilot areas in England⁹. Registers of common land and of town or village greens in other areas of England, and throughout Wales, continue to be kept under the Commons Registration Act 1965¹⁰. In relation to the pilot areas, where a determining authority¹¹ is determining an application to update the registers in consequence of qualifying events¹² which was made after the end of the transitional application period¹³, that authority may not determine that a register entry should be amended if it considers that, by reason of reliance reasonably placed on the register by a person since the end of the transitional application period, it would be unfair to do so¹⁴. Subject to that, a registration authority in the pilot areas may amend its registers after the end of the transitional period in consequence of a qualifying event, pursuant to an application made either before or after the end of that period¹⁵. Where, after the end of the transitional period, a right of common is registered in consequence of a qualifying event, the above-mentioned statutory provision with regard to extinguishment¹⁶ is to be treated as not having applied to that right of common¹⁷.

1 As to the meaning of 'regulations' see PARA 602 note 7.

2 As to the commons registration authorities see PARA 507.

3 As to the meanings of 'register of common land' and 'register of town or village greens' see PARA 424 notes 7, 12.

4 As to the meaning of 'the transitional period' see PARA 541.

5 Commons Act 2006 Sch 3 para 4(1) (not fully in force). As to the events which are qualifying events for these purposes see PARA 541 at heads (1)-(4) in the text. Regulations under Sch 3 para 4 may in particular include provision as to what is or is not to be regarded as severance of a right of common for the purposes of those regulations: Sch 3 para 5 (not fully in force). As to the provision made by virtue of Sch 3 para 5 in relation to the pilot areas in England see PARA 541 note 12; and as to the pilot areas in England see PARA 467 text and notes 29-30.

6 As to the meaning of 'right of common' see PARA 405.

7 The statutory provision referred to in the text is the Commons Act 2006 Sch 3 para 3 (not fully in force): see PARA 541.

8 Commons Act 2006 Sch 3 para 4(2) (not fully in force).

9 See the Commons Act 2006 (Commencement No 4 and Savings) (England) Order 2008, SI 2008/1960, art 2(1)(g); the Commons Act 2006 (Commencement No 1, Transitional Provisions and Savings) (Wales) Order 2007, SI 2007/2386, art 2. As to the pilot areas in England see PARA 467 text and notes 29-30.

10 As to the registers kept under the Commons Registration Act 1965 see PARA 510. See also PARA 528.

11 As to the meaning of 'determining authority' see PARA 522 note 19.

12 Is an application made for the purposes of the Commons Act 2006 Sch 3 para 2 (see PARA 541) or Sch 3 para 4 (see the text and notes 1-8).

13 As to the transitional application period see PARA 541 note 19.

14 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 42(4), (5).

15 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 43(1).

16 See note 7.

17 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 43(2).

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D. REGISTRATION, DEREGISTRATION AND EXCHANGE OF LAND

(A) OWNERSHIP OF LAND

543. Ownership of land; transitional provisions.

Where the ownership of any land¹ is registered in any register under the Commons Registration Act 1965² immediately before the commencement of Schedule 3 to the Commons Act 2006³, the ownership must, subject to Part 1 of the 2006 Act⁴, continue to be registered in that register⁵. Where the ownership of land continues to be so registered in a register of common land or town or village greens⁶, then if the commons registration authority⁷ is notified by the Chief Land Registrar⁸ that the land has been registered in the register of title⁹, the authority must:

- 292 (1) remove the registration of ownership; and
- 293 (2) indicate in the register in such manner as may be specified in regulations¹⁰ that the land has been registered in the register of title¹¹.

Regulations may require commons registration authorities:

- 294 (a) to remove registration of ownership of land from their registers of common land and town or village greens¹²;
- 295 (b) to keep or otherwise deal with documents received by them in connection with the registration of ownership of land in such manner as the regulations may specify¹³.

At the date at which this volume states the law, the above provisions were fully in force only in relation to the pilot areas in England¹⁴. Registers of common land and of town or village greens in other areas of England, and throughout Wales, continue to be kept under the Commons Registration Act 1965¹⁵.

Transitional provision is made with regard to the vesting of unclaimed land¹⁶.

An interest capable of registration under Part 1 of the Commons Act 2006 is excluded from protection by a notice under the Land Registration Act 2002¹⁷.

¹ As to the meaning of references to the ownership of land see PARA 430 note 5; and as to the meaning of 'land' for registration purposes see PARA 403 note 1.

² As to the registers under the Commons Registration Act 1965 see PARA 510 et seq.

³ The Commons Act 2006 Sch 3 paras 1-8 came into force in relation to the pilot areas in England on 1 October 2008 (see the Commons Act 2006 (Commencement No 4 and Savings) (England) Order 2008, SI 2008/1960, art 2(1)(g)); the Commons Act 2006 Sch 3 paras 2(1), (5), (6), 4, 5, 8(2), (3) came into force on 12 August 2007 in relation to Wales only in so far as they confer a power or impose a duty on the Welsh Ministers to make, or make provision by, regulations, or to make provision with respect to the exercise of any such power or performance of such duty (see the Commons Act 2006 (Commencement No 1, Transitional Provisions and Savings) (Wales) Order 2007, SI 2007/2386, art 2(1)(a), (c), (2)). The Commons Act 2006 Sch 3 para 9 (see note

16) came into force on 1 October 2006 in relation to the whole of England (see the Commons Act 2006 (Commencement No 1, Transitional Provisions and Savings) (England) Order 2006, SI 2006/2504, art 2(e)) and on 6 September 2007 in relation to Wales (see the Commons Act 2006 (Commencement No 1, Transitional Provisions and Savings) (Wales) Order 2007, SI 2007/2386, art 3(m)). As to the pilot areas in England see PARA 467 text and notes 29-30.

4 le subject to the Commons Act 2006 Pt 1 (ss 1-25) (not fully in force).

5 Commons Act 2006 Sch 3 para 8(1) (not fully in force).

6 As to the meanings of 'register of common land' and 'register of town or village greens' see PARA 424 notes 7, 12.

7 As to the commons registration authorities see PARA 507.

8 As to the Chief Land Registrar see **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 1066.

9 As to the meaning of 'register of title' see PARA 430 note 4.

10 As to the meaning of 'regulations' see PARA 602 note 7.

11 Commons Act 2006 Sch 3 para 8(2) (not fully in force). The following provisions apply in relation to any registered land in the pilot areas in England where (1) the register unit contains an ownership section; and (2) the registration authority is notified by the Chief Land Registrar that the land has become registered in the register of title: Commons Registration (England) Regulations 2008, SI 2008/1961, reg 48(1). If the ownership of the land is not registered in the ownership section of the register unit, the registration authority must insert a note in the ownership section: reg 48(2). If the ownership of the land is registered in the ownership section of the register unit, the registration authority must, in addition to deleting the registration of the ownership as required by the Commons Act 2006 Sch 3 para 8(2), insert a note in the ownership section: Commons Registration (England) Regulations 2008, SI 2008/1961, reg 48(3). As to the meaning of 'registered land' see PARA 477 note 9; and as to the register unit see PARA 527.

12 Commons Act 2006 Sch 3 para 8(3)(a) (not fully in force).

13 Commons Act 2006 Sch 3 para 8(3)(b) (not fully in force).

14 See note 3.

15 As to the registers kept under the Commons Registration Act 1965 see PARA 510. See also PARA 528.

16 The repeal by the Commons Act 2006 Sch 6 Pt 1 of the Commons Registration Act 1965 s 8 does not affect the vesting of land in any local authority (within the meaning of that Act) occurring by virtue of that provision: Commons Act 2006 Sch 3 para 9(1). Unless land so vesting is regulated by a scheme under the Commons Act 1899 (see PARA 590 et seq), the Open Spaces Act 1906 ss 10, 15 (power to manage and make byelaws: see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 577) continue to apply to it as if the local authority had acquired the ownership under that 1906 Act: Commons Act 2006 Sch 3 para 9(2).

In practice, it is possible that a person with documentary title as the lord of the manor or his successor may become the registered proprietor for the purposes of the Land Registration Act 2002 even if the land has 'vested' in the authority under the Commons Registration Act 1965 s 8 (repealed). The effect of the Commons Registration Act 1965 s 10 (see PARA 508) is to make the register conclusive as regards the status of the land (on the land register) as common and the rights (on the rights register) but it deliberately does not confirm the ownership (on the ownership register kept under that Act). Applicants for entry on the ownership register did not have to deduce title and the registering authorities were not competent to make decisions about title. The Commons Commissioner had to deal with disputed applications for entry on the ownership register and also awarded unclaimed land and for that purpose the commissioner (who was an experienced barrister) had to consider such matters but he was not a judge and his views are not binding as to matters of title.

17 Land Registration Act 2002 s 33(d) (prospectively amended by the Commons Act 2006 s Sch 5 para 8(1), (3), as from a day to be appointed under s 56(1); at the date at which this volume states the law, no such day had been appointed). See **LAND REGISTRATION** vol 26 (2004 Reissue) para 996. See also the Commons Act 2006 s 3(7) (not fully in force); and PARA 527.

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(B) STATUTORY DISPOSITIONS

544. Statutory dispositions.

Regulations¹ may make provision as to the amendment of a register of common land or town or village greens² where by virtue of any relevant instrument³:

296 (1) a disposition is made in relation to land⁴ registered in it as common land⁵ or as a town or village green⁶; or

297 (2) a disposition is made in relation to a right of common⁷ registered in it⁸.

Regulations may provide that, where:

298 (a) by virtue of any relevant instrument a disposition is made in relation to land registered as common land or as a town or village green;

299 (b) by virtue of regulations under the provisions set out above⁹ the land ceases to be so registered; and

300 (c) in connection with the disposition other land is given in exchange,

the land given in exchange is to be registered as common land or as a town or village green¹⁰.

Regulations under these provisions may:

301 (i) require the making of an application¹¹ to a commons registration authority¹² for amendment of a register of common land or town or village greens¹³;

302 (ii) provide that a relevant instrument, so far as relating to land registered as common land or as a town or village green or to any right of common, is not to operate at law until any requirement for which they provide is complied with¹⁴.

At the date at which this volume states the law, the above provisions were fully in force only in relation to the pilot areas in England¹⁵. Registers of common land and of town or village greens in other areas of England, and throughout Wales, continue to be kept under the Commons Registration Act 1965¹⁶.

1 As to the meaning of 'regulations' see PARA 602 note 7.

2 As to the meaning of 'register of common land' and 'register of town or village greens' see PARA 424 notes 7, 12.

3 For these purposes, 'relevant instrument' means (1) any order, deed or other instrument made under or pursuant to the Acquisition of Land Act 1981 (see PARA 481); (2) a conveyance made for the purposes of the New Parishes Measure 1943 s 13 (see PARA 477; and **ECCLESIASTICAL LAW**); (3) any other instrument made under or pursuant to any enactment: Commons Act 2006 s 14(3) (not fully in force).

4 As to the meaning of 'land' for registration purposes see PARA 403 note 1.

5 As to the meaning of 'land registered as common land' see PARA 424 note 7.

6 As to the meaning of 'land registered as a town or village green' see PARA 424 note 12.

7 As to the meaning of 'right of common' see PARA 405.

8 Commons Act 2006 s 14(1) (not fully in force).

9 The regulations under the Commons Act 2006 s 14(1) (not fully in force): see the text and notes 1-8.

10 Commons Act 2006 s 14(2) (not fully in force).

11 In relation to the pilot areas in England, there must be an application to the registration authority for amendment of a register of common land or of town or village greens in the event of a disposition effected by a relevant instrument in relation to registered land or a registered right of common: Commons Registration (England) Regulations 2008, SI 2008/1961, Sch 4 para 8(1), (2). A 'disposition' in relation to land, or in relation to a registered right of common, to which Sch 4 para 8 applies is one made under or pursuant to an enactment listed in Sch 4 para 8, Table col 1, as described in the corresponding entry in Sch 4 para 8, Table col 2; and a 'relevant instrument' (as defined in the Commons Act 2006 s 14(3) (see note 3)) to which the Commons Registration (England) Regulations 2008, SI 2008/1961, Sch 4 para 8 applies is any relevant instrument made under or pursuant to an enactment listed in Sch 4 para 8, Table col 1, as described in the corresponding entry in Sch 4 para 8, Table col 3: Sch 4 para 8(3), (4). Where: (1) in connection with a disposition of registered land, other land is given in exchange or otherwise substituted; or (2) in connection with a disposition of a registered right of common, other land is to be burdened with an equivalent right of common, the application to be made under Sch 4 para 8(2) must include an application for the registration of that other land as common land or as a town or village green, as the case may be, and, where applicable, for the registration of the equivalent right of common: Sch 4 para 8(5), (6). The application must be made by the person or body specified in the entry in Sch 4 para 8, Table col 4 corresponding to the relevant enactment: Sch 4 para 8(7). The application must include: (a) evidence of the applicant's capacity to make the application (as described in Sch 4 para 8(7)); (b) a copy of the relevant instrument effecting the disposition, and of any consent, authorisation, approval or certificate given for the purposes of that relevant instrument; (c) the number of the register unit and, where applicable, the number of the rights section entry, in the register of common land or town or village greens for the right of common to which the application relates; and (d) a description of the amendment required to be made in the register of common land or town or village greens: Sch 4 para 8(8). Where it relates to only part of a right of common, the application must be accompanied by an application made for the purposes of the Commons Act 2006 s 8 (apportionment: see PARA 522): Commons Registration (England) Regulations 2008, SI 2008/1961, Sch 4 para 8(9). In addition to the persons and bodies listed in Sch 6 para 1 (see PARA 550 note 24), the application must be served on the owner of any land affected by the application, other than the applicant: Sch 6 para 2, Table. As to the pilot areas in England see PARA 467 text and notes 29-30; as to applications in relation to those areas see generally Pt 3 (regs 15-38); and PARAS 540, 549 et seq; as to the fee to accompany the application see PARA 549 note 11; and as to the service of documents see PARA 532 note 17.

12 As to the commons registration authorities see PARA 507.

13 Commons Act 2006 s 14(4) (not fully in force).

14 Commons Act 2006 s 14(5) (not fully in force).

In relation to the pilot areas in England, where a relevant instrument: (1) in relation to any registered land, extinguishes a right of common or a right of access for open air recreation (however expressed); (2) in relation to any land registered as a town or village green, extinguishes a right to indulge in lawful sports or pastimes (however expressed); (3) confers, or vests in any person, a right over other land in exchange for a right which is extinguished as mentioned in head (1) or head (2) above; (4) causes any registered land to cease to be common land or a town or village green; or (5) causes any land to become common land or a town or village green, the relevant instrument does not, to the extent that it has any of the effects mentioned in heads (1)-(5) above, operate at law until, further to the granting of an application made under the Commons Registration (England) Regulations 2008, SI 2008/1961, Sch 4 para 8 (see note 11), the disposition effected by that instrument is registered in the register of common land or the register of town or village greens: reg 45(1), (2). For these purposes, 'disposition' means a disposition to which Sch 4 para 8 applies; and 'relevant instrument' means a relevant instrument (as defined in the Commons Act 2006 s 14(3) (see note 3)) to which the Commons Registration (England) Regulations 2008, SI 2008/1961, Sch 4 para 8 applies: reg 45(3). As to the pilot areas in England see PARA 467 text and notes 29-30; and as to the meaning of 'registered land' see PARA 477 note 9.

15 See the Commons Act 2006 (Commencement No 4 and Savings) (England) Order 2008, SI 2008/1960, art 2(1)(c); the Commons Act 2006 (Commencement No 1, Transitional Provisions and Savings) (Wales) Order 2007, SI 2007/2386, art 2. As to the pilot areas in England see PARA 467 text and notes 29-30.

16 As to the registers kept under the Commons Registration Act 1965 see PARA 510. See also PARA 528.

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(C) DEREGISTRATION AND EXCHANGE OF LAND

545. Applications for the deregistration and exchange of land.

The owner of any land¹ registered as common land or as a town or village green² may apply³ to the appropriate national authority⁴ for the land ('the release land') to cease to be so registered⁵. If the release land is more than 200 square metres in area, the application must include a proposal that land specified in the application ('replacement land') be registered as common land or as a town or village green in place of the release land⁶; and if the release land is not more than 200 square metres in area, the application may include such a proposal⁷. Where the application includes such a proposal:

- 303 (1) the replacement land must be land to which Part 1 of the Commons Act 2006⁸ applies⁹;
- 304 (2) the replacement land must not already be registered as common land or as a town or village green; and
- 305 (3) if the owner of the release land does not own the replacement land, the owner of the replacement land must join in the application¹⁰.

An application under these provisions may only be made with the consent of any relevant leaseholder¹¹ of, and the proprietor of any relevant charge¹² over, the release land and any replacement land¹³.

The following provisions apply to applications made in relation to land in England. The determining authority¹⁴ is not required to take any steps to deal with an application until the applicant has paid the specified fee¹⁵. As soon as practicable after receiving an application and the fee, the determining authority must send an acknowledgement of receipt to the applicant, which must include the reference number allocated to the application and a postal address and an email address to which written communications to the determining authority about the application may be sent¹⁶. The determining authority must, either when it receives the application or as soon as practicable after the expiry of the deadline for persons to make representations¹⁷, decide whether the application is to be dealt with on the basis of written representations, at a hearing¹⁸, or at a public inquiry¹⁹, and notify the applicant of that decision²⁰. If the determining authority is the Secretary of State, and he decides that the application is to be dealt with at a hearing or a public inquiry, he must appoint an inspector to conduct the hearing or inquiry and provide a report and recommendation to the Secretary of State²¹. The determining authority may, either when it acknowledges receipt of the application or at any time subsequently, direct the applicant to:

- 306 (a) provide any information or documents omitted from the application;
- 307 (b) provide any further information or documents necessary to enable the application to be determined; or
- 308 (c) send a notice of application to persons specified in the direction, or post a notice of application in places specified in the direction, in addition to the prescribed requirements²² for publicising the application²³.

The determining authority may specify a time for complying with any directions so given²⁴. If the applicant fails to comply with the prescribed requirements as to publicity²⁵ and the facilities for inspection and the supply of copies of documents²⁶, or with any directions given under heads (a) to (c) above, the determining authority may:

- 309 (i) treat the application as withdrawn;
- 310 (ii) give directions to the applicant to remedy the non-compliance and, if appropriate, extend the deadline for persons to make representations; or
- 311 (iii) waive the non-compliance, if satisfied that it would be unreasonable to require compliance and no-one is likely to be prejudiced by the non-compliance²⁷.

1 As to the meaning of references to the owner of any land see PARA 430 note 5; and as to the meaning of 'land' for registration purposes see PARA 403 note 1.

2 As to the meanings of 'land registered as common land' and 'land registered as a town or village green' see PARA 424 notes 7, 12. Until the coming into force of the Commons Act 2006 s 1 (see PARA 526) in relation to any area of England, references to land being registered as common land or as a town or village green in ss 16, 17 (see the text and notes 3-13; and PARAS 547, 548) are, in relation to that area, to be taken as references to land being so registered under the Commons Registration Act 1965: Commons Act 2006 (Commencement No 3, Transitional Provisions and Savings) (England) Order 2007, SI 2007/2584, art 3(1)(a)(i)). At the date at which this volume states the law, the Commons Act 2006 s 1 was in force only in relation to the pilot areas in England: see PARA 526. As to the pilot areas in England see PARA 467 text and notes 29-30.

3 In relation to England, an application under the Commons Act 2006 s 16 (see the text and notes 4-13) must be made in writing on a form provided by the Secretary of State, include the information specified in the form and be signed by, or by a representative of, every applicant: Deregistration and Exchange of Common Land and Greens (Procedure) (England) Regulations 2007, SI 2007/2589, reg 5(1). The application must be accompanied by (1) an ordnance map, at a scale of not less than 1:2,500 if available, and in any case not less than 1:10,000, showing (a) the boundary of the release land marked in red; (b) if the release land constitutes part of the land in a larger register unit, the boundary of the land in that register unit marked in dark green; and (c) the boundary of any replacement land marked in light green; and (2) a copy of the entry in the register which relates to the release land or land including it: reg 5(2). The application must be accompanied by a fee of £4,900: reg 5(3). 'Register' means a register of common land or a register of town or village greens (see PARA 424 notes 7, 12), and 'registered' and 'registration' are to be interpreted accordingly: reg 2(2).

4 As to the meaning of 'appropriate national authority' see PARA 411 note 1. The Secretary of State may appoint a person to exercise all or any of his functions in relation to applications under the Commons Act 2006 s 16 generally, or one or more particular applications under s 16: Deregistration and Exchange of Common Land and Greens (Procedure) (England) Regulations 2007, SI 2007/2589, reg 3(1). Such an appointment must be in writing: reg 3(2). The Secretary of State may at any time, by giving notice in writing to a person appointed under reg 3(1) ('an appointed person'): (1) revoke the appointment generally; (2) revoke the appointment in so far as it relates to a particular application which has not been determined by the appointed person before that time; or (3) revoke the authority of the appointed person to exercise a particular function in relation to an application: reg 3(3). A notice under reg 3(3) does not affect the validity of anything done by the appointed person before the notice is given: reg 3(4).

Any requirement imposed by or under the Deregistration and Exchange of Common Land and Greens (Procedure) (England) Regulations 2007, SI 2007/2589, for a person to send a notice or document to another person may be met by means of an electronic communication if (a) it results in the information contained in that notice or document being available to the other person in a form similar to the form in which it would appear in a notice or document sent in printed form; and (b) the other person consents to the notice or document being sent to him by those means: reg 4. 'Electronic communication' has the meaning given in the Electronic Communications Act 2000 s 15(1) (see **TELECOMMUNICATIONS AND BROADCASTING** vol 45(1) (2005 Reissue) PARA 616): Deregistration and Exchange of Common Land and Greens (Procedure) (England) Regulations 2007, SI 2007/2589, reg 2(2).

5 Commons Act 2006 s 16(1), (3) (not yet in force in relation to Wales).

6 Commons Act 2006 s 16(2) (not yet in force in relation to Wales).

7 Commons Act 2006 s 16(4) (not yet in force in relation to Wales).

8 I.e. the Commons Act 2006 Pt 1 (ss 1-25) (not fully in force).

9 As to the land to which the Commons Act 2006 Pt 1 applies see s 5; and PARA 424 note 6.

10 Commons Act 2006 s 16(5) (not yet in force in relation to Wales).

11 As to the meaning of 'relevant leaseholder' see PARA 468 note 4 (definition applied by the Commons Act 2006 s 16(10) (not yet in force in relation to Wales)).

12 As to the meaning of 'relevant charge' see PARA 468 note 5 (definition applied by the Commons Act 2006 s 16(10) (not yet in force in relation to Wales)).

13 Commons Act 2006 s 16(9) (not yet in force in relation to Wales).

14 'The determining authority' means (1) the Secretary of State, where he is exercising functions in relation to the determination of an application under the Commons Act 2006 s 16; or (2) a person who is exercising functions in relation to the determination of such an application pursuant to an appointment under the Deregistration and Exchange of Common Land and Greens (Procedure) (England) Regulations 2007, SI 2007/2589, reg 3(1) (see note 4) (other than an inspector who is appointed to carry out a hearing, inquiry or site inspection but not to determine an application): reg 2(2). 'Inspector' means (a) where the Secretary of State is the determining authority, a person appointed by the Secretary of State to carry out a hearing, inquiry or site inspection; or (b) where another person is the determining authority, the person who conducts a hearing, inquiry or site inspection: reg 2(2).

15 Deregistration and Exchange of Common Land and Greens (Procedure) (England) Regulations 2007, SI 2007/2589, reg 6(1). As to the specified fee see reg 5(3), cited in note 3.

16 Deregistration and Exchange of Common Land and Greens (Procedure) (England) Regulations 2007, SI 2007/2589, reg 6(2).

17 Ie under the Deregistration and Exchange of Common Land and Greens (Procedure) (England) Regulations 2007, SI 2007/2589, reg 9: see PARA 546.

18 As to hearings see PARA 546.

19 As to inquiries see PARA 546.

20 Deregistration and Exchange of Common Land and Greens (Procedure) (England) Regulations 2007, SI 2007/2589, reg 6(3).

21 Deregistration and Exchange of Common Land and Greens (Procedure) (England) Regulations 2007, SI 2007/2589, reg 6(4).

22 Ie the requirements in the Deregistration and Exchange of Common Land and Greens (Procedure) (England) Regulations 2007, SI 2007/2589, reg 7(1): see note 25.

23 Deregistration and Exchange of Common Land and Greens (Procedure) (England) Regulations 2007, SI 2007/2589, reg 6(5).

24 Deregistration and Exchange of Common Land and Greens (Procedure) (England) Regulations 2007, SI 2007/2589, reg 6(6).

25 Ie the requirements of the Deregistration and Exchange of Common Land and Greens (Procedure) (England) Regulations 2007, SI 2007/2589, reg 7. Not later than seven days after making an application an applicant must (1) publish a notice of application in a newspaper circulating in the area in which the release land and any replacement land are situated; (2) post a notice of application at the principal places of entry to (or, if there are no such places, at a conspicuous place on the boundary of) the release land and of the replacement land (if any); and (3) send a notice of application to (a) any person (other than the applicant) occupying the release land; (b) the occupier of any property shown in the register as being property to which rights of common over the release land are attached, and whom the applicant believes to be exercising those rights or likely to be affected by the application; (c) any other person known to the applicant to be entitled to exercise rights of common over the release land, and whom the applicant believes to be exercising those rights or likely to be affected by the application; and (d) the parish council or councils (if any) for the area in which the release land and the replacement land are situated: reg 7(1). The notice must contain the following details (i) the name of the applicant; (ii) the name of the common land or town or village green affected by the proposal; (iii) the location and area in square metres of the release land; (iv) whether the application includes a proposal for land to be registered as replacement land and, if so, the location and area in square metres of the replacement land; (v) a brief statement of the reason for the application; (vi) a postal address and an email address to which any representations may be sent; (vii) the date on which the period for making representations expires, which must be not less than 28 days after the date on which reg 7(1) is fully complied with; (viii) an address at which the application form and the documents listed in reg 5(2) (see note 3) are

available for inspection; (ix) the times and dates on which such inspection may take place, which must be in accordance with reg 8(2) (see note 26); and (x) an address from which copies of the application form and accompanying documents may be requested from the applicant: reg 7(2). The applicant must also send a notice of application to such other persons, or display a notice of application in such further places, as the determining authority may direct under reg 6(5): reg 7(3). The applicant must give notice to the determining authority when he has complied with reg 7(1)-(3), which must include details of (A) the newspaper in which the notice of application was published, and the date of publication; (B) the date on which a notice of application was posted on the land; (C) the persons to whom a notice of application was sent, the date or dates on which they were sent, and the nature of each such person's interest in the land (if any); and (D) the places at which a notice of application was posted on the land (if necessary, by reference to a map): reg 7(4)(a). That notice must also be accompanied by a copy of the page of the newspaper in which the notice of application was published: reg 7(4)(b).

26 le the requirements of the Deregistration and Exchange of Common Land and Greens (Procedure) (England) Regulations 2007, SI 2007/2589, reg 8. The applicant must ensure that copies of the application and the accompanying documents are available for inspection at the address specified in the notice of application for that purpose, at the times and dates specified in the notice of application: reg 8(1). Subject to reg 8(5), the times and dates at which the application and accompanying documents must be available for inspection must include all normal office hours during a period of not less than 28 days ending with the expiry of the period for making representations: reg 8(2). Any person may request a copy of the application and any of the accompanying documents from the applicant by writing to the address specified in the notice of application for that purpose: reg 8(3). Subject to reg 8(5), the applicant must respond to a request under reg 8(3) by supplying the requested documents as soon as practicable: reg 8(4). The determining authority may, however, give a direction authorising other arrangements for the inspection or supply of copies of documents, if satisfied that the applicant cannot reasonably be expected to comply with the obligation in reg 8(2) or (4): reg 8(5).

27 Deregistration and Exchange of Common Land and Greens (Procedure) (England) Regulations 2007, SI 2007/2589, reg 6(7).

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546. Procedure for dealing with applications in England.

The following provisions apply to applications for the deregistration and exchange of land¹ made in relation to land in England.

Any person may send² representations about the application to the determining authority³ by the date specified in the notice of application⁴. Such representations must:

- 312 (1) state the name and address of the person making them, and the nature of his interest (if any) in the release land⁵ or any replacement land⁶;
- 313 (2) be made in writing and signed⁷ by the person making them; and
- 314 (3) state the grounds on which they are made⁸.

As soon as reasonably practicable after the expiry of the period allowed for making representations, the determining authority must either notify the applicant that no representations have been made, or send the applicant a copy of all the representations received⁹. Where the applicant has received a copy of representations, he may reply to the determining authority within 21 days of such receipt, setting out his response to them¹⁰. Such a reply must be in writing, and signed¹¹ by the applicant or his representative¹².

If the determining authority decides to hold a hearing or inquiry, it must ensure that a notice of hearing or inquiry¹³ is:

- 315 (a) published on an appropriate website, and in a newspaper circulating in the area in which the release land and any replacement land are situated;
- 316 (b) sent to the applicant and to any person who has made representations in accordance with the provisions set out above¹⁴; and
- 317 (c) if the determining authority considers it necessary, publicised by such other means or sent to such other persons as may be appropriate to bring the hearing or inquiry to the attention of persons likely to be affected by the application¹⁵.

The date fixed for the start of the hearing or inquiry must be not less than six weeks after this requirement¹⁶ has been complied with¹⁷.

Subject to the prescribed provisions¹⁸, the procedure at a hearing or inquiry is to be determined by the inspector¹⁹. Any person interested in the subject-matter of a hearing or inquiry may appear at the hearing or inquiry in person or by a representative²⁰. The inspector may, at any stage of a hearing or inquiry, prevent any person from giving evidence, cross-examining a person giving evidence, or presenting any matter, if he considers it to be irrelevant or repetitious²¹. The inspector may also:

- 318 (i) require a person to leave a hearing or inquiry;
- 319 (ii) prevent him from participating in the hearing or inquiry by giving evidence, cross-examining a person giving evidence, or presenting any matter; or
- 320 (iii) permit him to remain at, or participate in, the hearing or inquiry only on specified conditions,

if he considers that the person is behaving in a disruptive manner²². The inspector may proceed with a hearing or inquiry in the absence of any person entitled to appear at it²³; and he may take into account any written representations or evidence or any other document received by him from any person before or during a hearing or inquiry, provided that he discloses it at the hearing or inquiry²⁴. The inspector may adjourn a hearing or inquiry to another date²⁵. He may also adjourn a hearing or inquiry to the site of the release land or any replacement land, and conduct part of the hearing or inquiry at that site in conjunction with a site inspection²⁶.

Where it has been decided to hold an inquiry, the inspector may, if he considers it desirable, hold a pre-inquiry meeting to determine the matters to be addressed and the procedure to be followed at the inquiry²⁷. If the inspector decides to hold a pre-inquiry meeting, he must give not less than two weeks' notice in writing to the applicant, to any person who has made written representations about the application and to any other person whose presence at the pre-inquiry meeting he considers desirable²⁸. The inspector may, at a pre-inquiry meeting, give directions to the applicant and to any other person wishing to appear at the inquiry about things to be done in preparation for the inquiry and may specify a date or dates by which any such directions must be complied with²⁹. In particular, the inspector may direct any person wishing to give evidence at the inquiry to send him a written statement of that evidence and to send a copy of that written statement to such other persons as he may specify³⁰.

At the start of an inquiry, the inspector must:

- 321 (A) identify the main issues to be considered at the inquiry;
- 322 (B) identify any matters on which he requires further explanation from any person appearing at the inquiry; and
- 323 (C) explain the procedure to be followed at the inquiry³¹.

Head (A) above does not, however, preclude other issues from being considered, or raised by persons appearing, at the inquiry³². If a person giving evidence at the inquiry has provided a written statement of evidence³³, the inspector may direct that the written statement is to be treated as the person's evidence, or as part of the person's evidence, and that other parties at the inquiry may cross-examine the person on the written statement³⁴.

Where the determining authority has notified the applicant that a hearing or inquiry is to be held in relation to an application, it may at any time before the conclusion of the hearing or inquiry decide to cancel the hearing or inquiry and determine the application by way of written representations, or to hold a hearing instead of an inquiry, or vice versa³⁵. The determining authority must consult the applicant before deciding to change the procedure for determining an application³⁶.

1 le applications under the Commons Act 2006 s 16 (not yet in force in relation to Wales): see PARA 545.

2 As to the use of electronic communications see PARA 545 note 4.

3 As to the meaning of 'the determining authority' see PARA 545 note 14.

4 Deregistration and Exchange of Common Land and Greens (Procedure) (England) Regulations 2007, SI 2007/2589, reg 9(1).

5 As to the meaning of 'release land' see PARA 545.

6 As to the meaning of 'replacement land' see PARA 545.

7 The requirements in the Deregistration and Exchange of Common Land and Greens (Procedure) (England) Regulations 2007, SI 2007/2589, reg 9(2), (5) for a document to be signed are satisfied, in the case of a document sent by means of an electronic communication in accordance with the regulations, by the person who is required to sign the document typing his name or producing his signature by computer or other mechanical means: reg 9(6).

8 Deregistration and Exchange of Common Land and Greens (Procedure) (England) Regulations 2007, SI 2007/2589, reg 9(2).

9 Deregistration and Exchange of Common Land and Greens (Procedure) (England) Regulations 2007, SI 2007/2589, reg 9(3).

10 Deregistration and Exchange of Common Land and Greens (Procedure) (England) Regulations 2007, SI 2007/2589, reg 9(4).

11 See note 7.

12 Deregistration and Exchange of Common Land and Greens (Procedure) (England) Regulations 2007, SI 2007/2589, reg 9(5).

13 The notice of hearing or inquiry must include (1) the name of the applicant; (2) the location of the release land; (3) a statement as to whether it is proposed that any land be registered as replacement land and, if so, the location of the replacement land; (4) a statement indicating that a hearing or inquiry (as the case may be) will be held in connection with the proposal; (5) the date, time and place of the hearing or inquiry and the name of the inspector; and (6) an address from which a copy of the application form and accompanying documents may be obtained from the determining authority: Deregistration and Exchange of Common Land and Greens (Procedure) (England) Regulations 2007, SI 2007/2589, reg 10(2). As to the meaning of 'inspector' see PARA 545 note 14; and as to the date of the hearing or inquiry see the text and notes 16-17.

14 Ie in accordance with the Deregistration and Exchange of Common Land and Greens (Procedure) (England) Regulations 2007, SI 2007/2589, reg 9: see the text and notes 1-12.

15 Deregistration and Exchange of Common Land and Greens (Procedure) (England) Regulations 2007, SI 2007/2589, reg 10(1).

16 Ie the Deregistration and Exchange of Common Land and Greens (Procedure) (England) Regulations 2007, SI 2007/2589, reg 10(1): see the text and notes 13-15.

17 Deregistration and Exchange of Common Land and Greens (Procedure) (England) Regulations 2007, SI 2007/2589, reg 10(3).

18 Ie subject to the Deregistration and Exchange of Common Land and Greens (Procedure) (England) Regulations 2007, SI 2007/2589, reg 11(2)-(7) (see the text and notes 20-26) and to regs 12, 14 (see the text and notes 19, 31-34).

19 Deregistration and Exchange of Common Land and Greens (Procedure) (England) Regulations 2007, SI 2007/2589, reg 11(1). A hearing must take the form of a discussion led by the inspector: reg 12(1). Subject to reg 11(3)-(5) (see the text and notes 21-23), the applicant is entitled to give, or to call another person to give, oral evidence; and any other person may give oral evidence with the permission of the inspector: reg 12(2). Cross-examination is not permitted unless the inspector decides that it is necessary to ensure a sufficient examination of the issues: reg 12(3).

20 Deregistration and Exchange of Common Land and Greens (Procedure) (England) Regulations 2007, SI 2007/2589, reg 11(2).

21 Deregistration and Exchange of Common Land and Greens (Procedure) (England) Regulations 2007, SI 2007/2589, reg 11(3).

22 Deregistration and Exchange of Common Land and Greens (Procedure) (England) Regulations 2007, SI 2007/2589, reg 11(4).

23 Deregistration and Exchange of Common Land and Greens (Procedure) (England) Regulations 2007, SI 2007/2589, reg 11(5).

24 Deregistration and Exchange of Common Land and Greens (Procedure) (England) Regulations 2007, SI 2007/2589, reg 11(6).

25 Deregistration and Exchange of Common Land and Greens (Procedure) (England) Regulations 2007, SI 2007/2589, reg 11(7)(a).

26 Deregistration and Exchange of Common Land and Greens (Procedure) (England) Regulations 2007, SI 2007/2589, reg 11(7)(b). Where an inspector is appointed to carry out a hearing or inquiry, he must inspect the release land and any replacement land before determining the application or producing a report: reg 15(1). In

any other case, before determining an application the determining authority may (1) inspect the release land and any replacement land; or (2) where the Secretary of State is the determining authority, appoint an inspector to inspect the release land and any replacement land and to produce a report: reg 15(2). Before making a site inspection under reg 15(1) or (2), the inspector or determining authority must ask the applicant whether he wishes to be present or be represented: reg 15(3). If the applicant states that he wishes to be present or be represented, the inspector or determining authority must give the applicant reasonable notice of the date and time of the inspection, and give the applicant or his representative the opportunity to be present: reg 15(4). The inspector or determining authority is not required to postpone an inspection if the applicant or his representative is not present at the appointed time: reg 15(5).

27 Deregistration and Exchange of Common Land and Greens (Procedure) (England) Regulations 2007, SI 2007/2589, reg 13(1). Regulation 11(1)-(5) (see the text and notes 18-23) applies to pre-inquiry meetings as it applies to inquiries: reg 13(3).

28 Deregistration and Exchange of Common Land and Greens (Procedure) (England) Regulations 2007, SI 2007/2589, reg 13(2).

29 Deregistration and Exchange of Common Land and Greens (Procedure) (England) Regulations 2007, SI 2007/2589, reg 13(4).

30 Deregistration and Exchange of Common Land and Greens (Procedure) (England) Regulations 2007, SI 2007/2589, reg 13(5).

31 Deregistration and Exchange of Common Land and Greens (Procedure) (England) Regulations 2007, SI 2007/2589, reg 14(1).

32 Deregistration and Exchange of Common Land and Greens (Procedure) (England) Regulations 2007, SI 2007/2589, reg 14(2).

33 In accordance with a direction under the Deregistration and Exchange of Common Land and Greens (Procedure) (England) Regulations 2007, SI 2007/2589, reg 13(5): see the text and note 30.

34 Deregistration and Exchange of Common Land and Greens (Procedure) (England) Regulations 2007, SI 2007/2589, reg 14(3).

35 Deregistration and Exchange of Common Land and Greens (Procedure) (England) Regulations 2007, SI 2007/2589, reg 16(1).

36 Deregistration and Exchange of Common Land and Greens (Procedure) (England) Regulations 2007, SI 2007/2589, reg 16(2).

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547. Determination of application.

In determining an application for the deregistration and exchange of land¹, the appropriate national authority² must have regard to:

- 324 (1) the interests of persons having rights in relation to, or occupying, the release land³ (and in particular persons exercising rights of common⁴ over it);
- 325 (2) the interests of the neighbourhood;
- 326 (3) the public interest⁵;
- 327 (4) any other matter considered to be relevant⁶.

In a case where the release land is not more than 200 square metres in area, and the application does not include a proposal for the registration of replacement land⁷, the appropriate national authority must have particular regard to the extent to which the absence of such a proposal is prejudicial to the interests specified in heads (1) to (3) above⁸.

The following provisions apply in relation to England. As soon as practicable after considering:

- 328 (a) the application and all representations made⁹;
- 329 (b) the findings made at a site inspection¹⁰, if any; and
- 330 (c) where a hearing or inquiry has been held¹¹, either:
 - 19 24. (i) the evidence presented at the hearing or inquiry (if the determination is being made by the inspector¹² who heard the evidence); or
 - 20 25. (ii) the report and recommendation of the inspector (if the determination is not being made by the inspector),

the determining authority¹³ must determine whether or not to grant the application, and must notify¹⁴ the applicant in writing of that decision and the reasons for it¹⁵. Where an inspector has produced a report following a hearing, inquiry or site inspection, the notification of the decision must be accompanied by a copy of that report¹⁶. If the determining authority grants the application, it must also send its order¹⁷ to the commons registration authority¹⁸ for the area in which the release land and the replacement land (if any) are situated, and send a copy of the order to the applicant¹⁹. The determining authority must publish its decision and the reasons for it on an appropriate website²⁰. If it grants the application, the authority must also publish a copy of its order²¹ on such a website²².

1 le an application under the Commons Act 2006 s 16: see PARA 545.

2 As to the meaning of 'appropriate national authority' see PARA 411 note 1.

3 As to the meaning of 'release land' see PARA 545.

4 As to the meaning of 'rights of common' see PARA 405.

5 The reference in head (3) in the text to the public interest includes the public interest in (1) nature conservation; (2) the conservation of the landscape; (3) the protection of public rights of access to any area of

land; and (4) the protection of archaeological remains and features of historic interest: Commons Act 2006 s 16(8) (not yet in force in relation to Wales). 'Nature conservation' means the conservation of flora and fauna and geological and physiographical features: s 61(1).

6 Commons Act 2006 s 16(6) (not yet in force in relation to Wales).

7 Ie a proposal under the Commons Act 2006 s 16(3): see PARA 545.

8 Commons Act 2006 s 16(7) (not yet in force in relation to Wales).

9 Ie all representations made in accordance with the Deregistration and Exchange of Common Land and Greens (Procedure) (England) Regulations 2007, SI 2007/2589, reg 9: see PARA 546.

10 As to site inspections see PARA 546 note 26.

11 As to the procedure at inquiries and hearings see PARA 546.

12 As to the meaning of 'inspector' see PARA 545 note 14.

13 As to the meaning of 'the determining authority' see PARA 545 note 14.

14 As to the use of electronic communications see PARA 545 note 4.

15 Deregistration and Exchange of Common Land and Greens (Procedure) (England) Regulations 2007, SI 2007/2589, reg 17(1).

16 Deregistration and Exchange of Common Land and Greens (Procedure) (England) Regulations 2007, SI 2007/2589, reg 17(2).

17 Ie its order under the Commons Act 2006 s 17: see PARA 548.

18 As to the commons registration authorities see PARA 507.

19 Deregistration and Exchange of Common Land and Greens (Procedure) (England) Regulations 2007, SI 2007/2589, reg 17(3).

20 Deregistration and Exchange of Common Land and Greens (Procedure) (England) Regulations 2007, SI 2007/2589, reg 18(a).

21 See note 17.

22 Deregistration and Exchange of Common Land and Greens (Procedure) (England) Regulations 2007, SI 2007/2589, reg 18(b).

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548. Orders for deregistration and exchange.

Where the appropriate national authority¹ grants an application for the deregistration and exchange of land² it must make an order requiring the commons registration authority³ to remove the release land⁴ from its register of common land or town or village greens⁵. Where the application included a proposal to register replacement land⁶, the order must also require the commons registration authority:

- 331 (1) to register the replacement land as common land or as a town or village green in place of the release land; and
- 332 (2) to register as exercisable over the replacement land any rights of common⁷ which, immediately before the relevant date⁸, are registered as exercisable over the release land⁹.

A commons registration authority must take such other steps on receiving an order under these provisions as regulations¹⁰ may require¹¹.

Where immediately before the relevant date:

- 333 (a) any rights of common are registered as exercisable over the release land, those rights are on that date extinguished in relation to that land¹²;
- 334 (b) any rights are exercisable over the release land by virtue of its being, or being part of, a town or village green:
 - 21
 - 26. (i) those rights are extinguished on that date in respect of the release land; and
 - 27. (ii) where any replacement land is registered in its place, those rights are to become exercisable as from that date over the replacement land instead¹³;
 - 22
 - 335 (c) the release land was registered as common land¹⁴ and any relevant provision¹⁵ applied in relation to it:
 - 23
 - 28. (i) the provision ceases, on that date, to apply to the release land; and
 - 29. (ii) where any replacement land is registered in its place, the provision applies on that date to the replacement land instead¹⁶.
 - 24

An order under these provisions may, however, contain provision disapplying the effect of head (b)(ii) or head (c)(ii) above in relation to any replacement land¹⁷. Such an order may also contain supplementary provision:

- 336 (A) as to the effect in relation to any replacement land of any rights exercisable over the release land by virtue of its being, or being part of, a town or village green, or of any relevant provision¹⁸;
- 337 (B) as to the effect in relation to the release land or any replacement land of any local or personal Act¹⁹.

Regulations may make provision for the publication of an order under these provisions²⁰.

1 As to the meaning of 'appropriate national authority' see PARA 411 note 1.

2 ie an application under the Commons Act 2006 s 16: see PARA 545.

3 As to the commons registration authorities see PARA 507.

4 As to the meaning of 'release land' see PARA 545.

5 Commons Act 2006 s 17(1) (not yet in force in relation to Wales). As to the meanings of 'register of common land' and 'register of town or village greens' see PARA 424 notes 7, 12. See also PARA 545 note 2.

An order under s 17(1) relating to land in any area of England is, until the coming into force of s 1 (see PARA 526) in relation to that area, to be taken as an order requiring the commons registration authority to remove the release land from its register of common land or town or village greens kept under the Commons Registration Act 1965, and (where applicable) to register the matters referred to in the Commons Act 2006 s 17(2) (see the text and notes 6-9) in that register: Commons Act 2006 (Commencement No 3, Transitional Provisions and Savings) (England) Order 2007, SI 2007/2584, art 3(2). At the date at which this volume states the law, the Commons Act 2006 s 1 was in force only in relation to the pilot areas in England: see PARA 526. As to the pilot areas in England see PARA 467 text and notes 29-30.

In England, except in the pilot areas, where a commons registration authority receives a deregistration order or a deregistration and exchange order, it must amend the register unit in its register of common land or register of town or village greens which contains the registration of the release land in accordance with the Commons Registration (General) Regulations 1966, SI 1966/1471, Schedule Pt 2, Standard Entry 11: see the Commons (Deregistration and Exchange Orders) (Interim Arrangements) (England) Regulations 2007, SI 2007/2585, reg 3 (revoked in relation to the pilot areas by SI 2008/1961).

6 As to the meaning of 'replacement land' see PARA 545.

7 As to the meaning of 'rights of common' see PARA 405. Until the coming into force of the Commons Act 2006 s 1 (see PARA 526) in relation to any area of England, references in s 17 to rights of common being registered as exercisable over such land are, in relation to that area, to be taken as references to rights of common being so registered under the Commons Registration Act 1965: Commons Act 2006 (Commencement No 3, Transitional Provisions and Savings) (England) Order 2007, SI 2007/2584, art 3(1)(b). At the date at which this volume states the law, the Commons Act 2006 s 1 was in force only in relation to the pilot areas in England: see PARA 526. As to the pilot areas in England see PARA 467 text and notes 29-30.

8 For these purposes, 'relevant date' means the date on which the commons registration authority amends its register as required under the Commons Act 2006 s 17(1), (2) (not fully in force): s 17(9) (not yet in force relation to Wales).

9 Commons Act 2006 s 17(2) (not yet in force relation to Wales). As to the registration of replacement land in England outside the pilot areas see the Commons (Deregistration and Exchange Orders) (Interim Arrangements) (England) Regulations 2007, SI 2007/2585, reg 4, and as to the registration of rights of common over such replacement land see reg 5 (both revoked in relation to the pilot areas by SI 2008/1961).

10 As to the meaning of 'regulations' see PARA 602 note 7.

11 Commons Act 2006 s 17(3) (not fully in force relation to Wales). In relation to the pilot areas in England, where the Secretary of State has granted an application under s 16 and made an order to a registration authority under s 17(1), or under s 17(1) and (2), then when the registration authority has amended its registers in accordance with the order, it must give written notice of that fact, including details of the amendment made, to (1) the applicant under s 16; and (2) the Secretary of State: Commons Registration (England) Regulations 2008, SI 2008/1961, reg 49(1), (2). As to the pilot areas in England see PARA 467 text and notes 29-30. Similar provision is made with regard to the rest of England: see the Commons (Deregistration and Exchange Orders) (Interim Arrangements) (England) Regulations 2007, SI 2007/2585, reg 6 (revoked in relation to the pilot areas by SI 2008/1961).

12 Commons Act 2006 s 17(4) (not yet in force relation to Wales).

13 Commons Act 2006 s 17(5) (not yet in force relation to Wales).

14 As to the meaning of 'land registered as common land' see PARA 424 note 7.

15 For these purposes, and the purposes of the Commons Act 2006 s 17(7) (see the text and notes 17-19), 'relevant provision' means a provision contained in, or made under (1) the Law of Property Act 1925 s 193 (see

PARA 580; and **OPEN SPACES AND COUNTRYSIDE**); (2) a scheme under the Metropolitan Commons Act 1866 (see **LONDON GOVERNMENT**); (3) an Act under the Commons Act 1876 confirming a provisional order of the Inclosure Commissioners (see PARA 586); (4) a scheme under the Commons Act 1899 (see PARA 590 et seq); (5) the Commons Act 1908 s 1 (see PARAS 599-600); Commons Act 2006 s 17(8) (not yet in force relation to Wales).

16 Commons Act 2006 s 17(6) (not yet in force relation to Wales).

17 Commons Act 2006 s 17(7)(a) (not yet in force relation to Wales).

18 Commons Act 2006 s 17(7)(b) (not yet in force relation to Wales); and see note 15.

19 Commons Act 2006 s 17(7)(c) (not yet in force relation to Wales).

20 Commons Act 2006 s 17(10) (not fully in force relation to Wales). See the Deregistration and Exchange of Common Land and Greens (Procedure) (England) Regulations 2007, SI 2007/2589, reg 18(b), cited in PARA 547 note 22.

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E. PROCEDURE FOR APPLICATIONS AND PROPOSALS IN THE PILOT AREAS

549. Making an application to amend the registers.

The following provisions apply in relation to the pilot areas in England¹.

An application to amend the registers² must:

- 338 (1) be made in writing on a form provided by the registration authority³ to which the application is to be made; and
- 339 (2) be signed⁴ by, or by a representative of, every applicant who is an individual, and by the secretary or some other duly authorised officer of every applicant which is a body corporate or an unincorporated association⁵.

Particular provision is made⁶ with regard to specific types of applications as to:

- 340 (a) the circumstances in which an application is permitted or required to be made;
- 341 (b) who may make the application; and
- 342 (c) the matters which must be included in or which must⁷ accompany the application⁸;

but an applicant is not required to include with an application a copy of any document specified in that particular provision⁹ if:

- 343 (i) the registration authority issued the document, or was a party to the document; or
- 344 (ii) the document has been deposited with the registration authority in accordance with any enactment¹⁰.

An application must be accompanied by the appropriate fee, if any, specified¹¹ for an application of that type¹². A registration authority is not required to take any steps to deal with an application until the applicant has paid the fee so specified¹³.

1 As to the pilot areas in England see PARA 467 text and notes 29-30.

2 As to the meaning of 'application' for these purposes see PARA 507 note 10.

3 As to the commons registration authorities see PARA 507.

4 No signature is required where electronic communications are used: see PARA 532 note 17.

5 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 16(1).

6 le by the Commons Registration (England) Regulations 2008, SI 2008/1961, Sch 4: see PARAS 467, 493, 499, 501, 522-523, 525, 534, 535 et seq, 541 et seq; and, with regard to applications under the Commons Act 2006 s 15 (registration of town or village greens), **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 541.

7 le subject to the Commons Registration (England) Regulations 2008, SI 2008/1961, reg 16(3): see the text and notes 9-10.

8 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 16(2).

9 le specified in the Commons Registration (England) Regulations 2008, SI 2008/1961, Sch 4: see PARAS 467, 493, 499, 501, 522-523, 525, 534 et seq, 541 et seq; and, with regard to applications under the Commons Act 2006 s 15 (registration of town or village greens), **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 541.

10 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 16(3).

11 le specified in or under the Commons Registration (England) Regulations 2008, SI 2008/1961, Sch 5. Subject to Sch 5 para 2, the fee that must accompany an application made under, or for the purposes of, a provision listed in Sch 5, Table col 1 is the fee (if any) specified in the corresponding entry in Sch 5, Table col 3: Sch 5 para 1. Where (1) an application made for the purposes of the Commons Act 2006 s 8 (apportionment: see PARA 522) accompanies a primary application within the meaning given by the Commons Registration (England) Regulations 2008, SI 2008/1961, Sch 4 para 3(1) (see PARA 522); or (2) an application made for the purposes of the Commons Act 2006 Sch 3 para 2 (see PARA 541) or Sch 3 para 4 (see PARA 542) to amend a register in consequence of an apportionment of a right of common accompanies a primary application within the meaning given by the Commons Registration (England) Regulations 2008, SI 2008/1961, Sch 4 para 18(1) (see PARA 541 note 14), the fee specified for that application is payable in addition to the fee specified for the primary application: Sch 5 para 2. The registration authority to which an application is made may substitute a different amount (including different amounts for applications made under or pursuant to different provisions) for an amount for the time being specified in Sch 5, Table col 3, but may not charge any fee if 'no fee' is specified therein: Sch 5 para 3. In determining any such different amount the registration authority must have regard to its costs in dealing with applications of the type in question, but in no case may such a substituted different amount exceed £1,000: Sch 5 para 4. Any different amount of fee payable on an application that is specified by a registration authority under Sch 5 para 3 must be published on its website not less than 14 days before such different amount is to take effect: Sch 5 para 5.

12 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 17(1).

13 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 17(2).

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550. Management of, and publicity for, application.

The following provisions apply in relation to the pilot areas in England¹.

As soon as practicable after receiving an application² and the specified fee³, if any, the registration authority⁴ must send an acknowledgement of receipt to the applicant, which must include the reference number allocated to the application and a postal address and an email address to which written communications to the registration authority may be sent⁵. The registration authority may, either when it acknowledges receipt of the application or at any time subsequently, direct the applicant:

- 345 (1) to provide any further information or documents necessary to enable the application to be determined;
- 346 (2) subject to certain exceptions⁶, to publish a notice of the application in such one or more newspapers circulating in the relevant area as the registration authority may direct, and as appears to it sufficient to secure adequate publicity;
- 347 (3) to post a notice of the application⁷ at any place or places specified in the direction, whether on the land to which the application relates or elsewhere; or
- 348 (4) to serve⁸ a notice of the application on persons specified in the direction, in addition to the prescribed requirements⁹ relating to publicity¹⁰.

The registration authority may specify a time for complying with any directions so given¹¹.

The applicant must give notice to the registration authority when any directions so given have been complied with¹². If the applicant was given a direction:

- 349 (a) under head (2) above, that notice must be accompanied by a copy of the relevant page of each newspaper in which the notice of application was published¹³;
- 350 (b) under head (3) above, that notice must include details of where and when the notice of the application was posted¹⁴;
- 351 (c) under head (4) above, that notice must include details of the date on which, and the means by which, each notice of the application was served¹⁵.

If the applicant fails to comply with his duty to publicise the application¹⁶, or with any directions given under the above provisions, the registration authority may:

- 352 (i) treat the application as abandoned;
- 353 (ii) give directions to the applicant to remedy the non-compliance and, if appropriate, extend the deadline for persons to make representations¹⁷; or
- 354 (iii) waive the non-compliance, if satisfied in all the circumstances that no-one is likely to be prejudiced by it and it would be unreasonable to require compliance¹⁸.

As soon as reasonably practicable after receiving an application complying with the prescribed requirements¹⁹, the registration authority must publish a notice of the application on its website and must serve a notice of the application by email on anyone who has previously asked to be

informed of all applications and proposals, and who has given the authority an email address for that purpose²⁰.

As soon as reasonably practicable after receiving an acknowledgment of an application²¹, the applicant must²² serve a notice of the application on each of the persons specified²³ in relation to an application of that kind²⁴ and must give notice to the registration authority of having complied with this requirement²⁵. A notice so given to the registration authority must specify the persons on whom the notice of the application was served, and in relation to each such person state:

- 355 (A) the date on which, and the means by which, the notice of the application was served on that person; and
- 356 (B) the nature of that person's interest (if any) in the land to which the application relates²⁶.

A requirement²⁷ to serve a notice on an owner of land²⁸ does not, however, apply if that person cannot reasonably be identified²⁹. Furthermore, the registration authority may, in relation to any application, direct that the requirement to serve notice on any person who is registered as the owner of a right of common in gross³⁰ which is exercisable over all or part of the land to which the application relates³¹ is not to apply, if it considers that the persons registered as owners of rights of common in gross are so numerous that it would not be reasonably practicable for the applicant to serve notice of the application on all of them³².

1 As to the pilot areas in England see PARA 467 text and notes 29-30.

2 As to the meaning of 'application' for these purposes see PARA 507 note 10.

3 As to the specified fees see the Commons Registration (England) Regulations 2008, SI 2008/1961, Sch 5.

4 As to the commons registration authorities see PARA 507.

5 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 20(1).

6 Ie otherwise than in the case of an application referred to in the Commons Registration (England) Regulations 2008, SI 2008/1961, reg 21(2) (see note 20): reg 20(2)(b).

7 A notice of an application or proposal which is required to be published, posted or served (1) by a direction of a registration authority under the Commons Registration (England) Regulations 2008, SI 2008/1961, reg 20; or (2) under reg 21, 22 or 23 (see the text and notes 19-32; and PARA 551), must contain the following details: (a) a reference to 'the Commons Act 2006', and the provision of that Act under (or pursuant to which) the application or proposal is made; (b) the name of the applicant (in the case of an application); (c) the name of the registration authority; (d) the name and location of the land to which the application or proposal relates; (e) a summary of the effect of the application or proposal; (f) both a postal address and an email address for the registration authority to which any representations concerning the application or proposal may be sent; (g) a statement that any representations will not be treated as confidential, but will be dealt with in accordance with reg 26 (see PARA 552), and that where the application or proposal is referred to the Planning Inspectorate for determination in accordance with reg 27 (see PARA 553), any representations will be sent to the Planning Inspectorate; (h) the date on which the period for making representations expires, which must not be less than 42 days after the date of the publishing, posting or service of the notice; and (i) the address of the registration authority at which documents relating to the application or proposal are available for inspection: reg 24. The registration authority must ensure that copies of the following documents are available for inspection at the address specified for that purpose in any notice of the application, namely copies of the application and any accompanying documents: reg 25(1)(a). The times and dates at which the documents referred to in reg 25(1)(a) are available for inspection must include all normal office hours during a period of not less than 42 days ending with the expiry of the period for making representations: reg 25(2). As to the meaning of 'proposal' see PARA 507 note 11; and as to the making of proposals see PARA 551. As to the meaning of 'the Planning Inspectorate' see PARA 522 note 19.

8 As to the service of notices see PARA 532 note 17.

9 Ie in addition to the requirements in the Commons Registration (England) Regulations 2008, SI 2008/1961, reg 22: see the text and notes 21-32.

- 10 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 20(2). As to the meaning of 'relevant area' see PARA 534 note 13.
- 11 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 20(3).
- 12 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 20(4).
- 13 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 20(4)(a).
- 14 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 20(4)(b).
- 15 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 20(4)(c).
- 16 In his duty under the Commons Registration (England) Regulations 2008, SI 2008/1961, reg 22: see the text and notes 21-32.
- 17 As to making representations see PARA 552.
- 18 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 20(5).
- 19 In complying with the Commons Registration (England) Regulations 2008, SI 2008/1961, regs 17, 18: see PARA 549.
- 20 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 21(1). In addition, the requirements in reg 21(3) apply in relation to (1) an application under the Commons Act 2006 s 15 (registration of greens: see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 541); (2) an application under s 19 (correction of registers: see PARA 534) for the removal of registered land from, or for the addition of land to, a register; or (3) an application under Sch 2 (non-registration or mistaken registration under the Commons Registration Act 1965: see PARA 535 et seq; and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 532 et seq): Commons Registration (England) Regulations 2008, SI 2008/1961, reg 21(2). As soon as reasonably practicable after receiving an application referred to in reg 21(2), the registration authority must (a) publish a notice of the application in such one or more newspapers circulating in the relevant area as appears to the authority to be sufficient to secure adequate publicity; and (b) serve a notice of the application on every other local authority for that area: reg 21(3). As to the meaning of 'relevant area' see PARA 534 note 13.
- 21 In pursuant to the Commons Registration (England) Regulations 2008, SI 2008/1961, reg 20(1): see the text and notes 1-5.
- 22 In subject to the Commons Registration (England) Regulations 2008, SI 2008/1961, reg 22(2), (3): see the text and notes 27-32.
- 23 In specified in the Commons Registration (England) Regulations 2008, SI 2008/1961, Sch 6: see note 24.
- 24 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 22(1)(a). In all cases, notice of the application must be served on: (1) any person who has made a declaration, duly recorded in the register, of entitlement to a right of common over any land comprising the whole or part of the register unit to which the application relates; (2) any commons council established for, or other body representing the interests of persons with rights of common over, land which includes the land to which the application relates; and (3) unless the registration authority directs otherwise pursuant to reg 22(2) (see the text and notes 30-32), any person who is registered as the owner of a right of common in gross which is exercisable over all or part of the land to which the application relates: Sch 6 para 1. Additionally, in the case of an application of a type specified in Sch 6 para 2, Table col 1, such notice must be served on all the persons (other than the applicant) specified in the corresponding entry in Sch 6 para 2, Table, col 2: Sch 6 para 2.
- 25 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 22(1)(b).
- 26 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 22(4).
- 27 In a requirement pursuant to the Commons Registration (England) Regulations 2008, SI 2008/1961, Sch 6 para 2.
- 28 As to the meaning of references to the owner of any land see PARA 430 note 5.
- 29 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 22(3).
- 30 As to the meaning of 'right of common in gross' see PARA 468 note 3.

31 le the requirement contained in the Commons Registration (England) Regulations 2008, SI 2008/1961, Sch 6 para 1(c): see note 24 head (3).

32 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 22(2).

UPDATE

550 Management of, and publicity for, application

NOTE 20--SI 2008/1961 reg 21(2) amended: SI 2009/2018.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/3. REGISTRATION OF COMMON LAND/(3) REGISTRATION UNDER THE COMMONS ACT 2006/(iii) The Registers/E. PROCEDURE FOR APPLICATIONS AND PROPOSALS IN THE PILOT AREAS/551. Making and publicising a proposal to amend the registers.

551. Making and publicising a proposal to amend the registers.

The following provisions apply in relation to the pilot areas in England¹.

Before taking any other steps² in relation to a proposal to amend the registers³, a registration authority⁴ must prepare a statement in writing describing the proposal and explaining the justification for it⁵.

A registration authority which has prepared a statement of a proposal to amend a register on its own initiative must, before taking any further steps in relation to the proposal, comply with the following provisions⁶. The registration authority must publish a notice of the proposal on its website⁷. If the proposal is to register or deregister any land as common land or as a town or village green⁸, the registration authority must publish a notice of the proposal in such one or more newspapers circulating in the relevant area as appears to it to be sufficient to secure adequate publicity⁹. The registration authority must serve¹⁰ a notice of the proposal¹¹ on the following persons:

- 357 (1) any person who has made a declaration, duly recorded in the register, of entitlement to a right of common¹² over any land comprising the whole or any part of the register unit¹³ to which the proposal relates¹⁴;
- 358 (2) any commons council¹⁵ established for, or other body representing the interests of persons with rights of common over, land which includes the land to which the proposal relates¹⁶; and
- 359 (3) any owner of a right of common in gross¹⁷ which is exercisable over any land comprising the whole or any part of the register unit to which the proposal relates¹⁸.

The registration authority must also serve a notice of the proposal by email on any other person who has previously asked to be informed of all applications and proposals, and who has given the authority an email address for that purpose¹⁹.

1 As to the pilot areas in England see PARA 467 text and notes 29-30.

2 Ie under the Commons Registration (England) Regulations 2008, SI 2008/1961, Pt 3 (regs 15-38): see PARA 540, 549-550; the text and notes 3-19; and PARAS 553-555.

3 As to the meaning of 'proposal' for these purposes see PARA 507 note 11.

4 As to the commons registration authorities see PARA 507.

5 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 18(1).

6 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 23(1).

7 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 23(2).

8 As to the meanings of 'land registered as common land' and 'land registered as a town or village green' see PARA 424 notes 7, 12.

9 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 23(3). As to the meaning of 'relevant area' see PARA 534 note 13.

10 As to the service of notices see PARA 532 note 17.

11 As to the contents of the notice of proposal see the Commons Registration (England) Regulations 2008, SI 2008/1961, reg 24, cited in PARA 550 note 7. The registration authority must ensure that copies of the following documents are available for inspection at the address specified for that purpose in any notice of the proposal, namely copies of (1) the statement prepared in accordance with reg 18(1) (see the text and notes 1-5); and (2) any documents in the possession of the registration authority which are relevant to the proposal: reg 25(1)(b). The times and dates at which the documents referred to in reg 25(1)(b) are available for inspection must include all normal office hours during a period of not less than 42 days ending with the expiry of the period for making representations: reg 25(2). As to making representations see PARA 552.

12 As to the meaning of 'right of common' see PARA 405.

13 As to the register unit see PARA 527.

14 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 23(4)(a). As to declarations of entitlement to a right of common see PARA 532.

15 As to commons councils see PARA 601.

16 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 23(4)(b).

17 As to the meaning of 'right of common in gross' see PARA 468 note 3.

18 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 23(4)(c).

19 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 23(5).

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/3. REGISTRATION OF COMMON LAND/(3) REGISTRATION UNDER THE COMMONS ACT 2006/(iii) The Registers/E. PROCEDURE FOR APPLICATIONS AND PROPOSALS IN THE PILOT AREAS/552. Representations.

552. Representations.

The following provisions apply in relation to the pilot areas in England¹.

Any person may, by the date specified in a notice of an application or proposal to amend the registers², make representations in writing to the registration authority³ about the application or proposal⁴. Such representations:

- 360 (1) must state the name and postal address of the person making them, and the nature of that person's interest, if any, in any land⁵ affected by the application or proposal;
- 361 (2) may include an email address of the person making them;
- 362 (3) must be signed⁶ by the person making them; and
- 363 (4) must state the grounds on which they are made⁷.

As soon as reasonably practicable after the expiry of the period allowed for making representations in respect of an application, the registration authority must:

- 364 (a) notify the applicant that no representations have been made; or
- 365 (b) serve⁸ on the applicant a copy of all the representations it has received⁹.

The applicant may reply¹⁰ in writing to the registration authority within 21 days of being served with a copy of representations, setting out the applicant's response to the representations¹¹.

1 As to the pilot areas in England see PARA 467 text and notes 29-30.

2 As to the contents of a notice of an application or proposal see PARAS 550 note 7, 551 note 11; and as to the meaning of 'application' and 'proposal' for these purposes see PARA 507 notes 10, 11.

3 As to the commons registration authorities see PARA 507.

4 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 26(1).

5 As to the meaning of 'land' for registration purposes see PARA 403 note 1.

6 No signature is required where electronic communication is used: see PARA 532 note 17.

7 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 26(2).

8 As to the service of documents see PARA 532 note 17.

9 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 26(3).

10 Except where electronic communication is used (see PARA 532 note 17), such a reply must be signed by the person making it: see the Commons Registration (England) Regulations 2008, SI 2008/1961, reg 26(5).

11 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 26(4).

UPDATE

552 Representations

TEXT AND NOTE 11--SI 2008/1961 reg 26 amended: SI 2009/2018.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/3. REGISTRATION OF COMMON LAND/(3) REGISTRATION UNDER THE COMMONS ACT 2006/(iii) The Registers/E. PROCEDURE FOR APPLICATIONS AND PROPOSALS IN THE PILOT AREAS/553. Responsibility for, and method of, determining applications and proposals.

553. Responsibility for, and method of, determining applications and proposals.

The following provisions apply in relation to the pilot areas in England¹.

Subject to the following provisions²:

- 366 (1) an application to amend the registers³ made in accordance with the relevant regulations⁴ must be determined by the registration authority⁵ to which it was made⁶; and
- 367 (2) a registration authority which has made a proposal to amend the registers⁷ in accordance with those regulations must determine whether or not to amend its registers in accordance with the proposal⁸.

In certain specified cases⁹, however, a registration authority must refer to the Planning Inspectorate¹⁰ for determination by it any such application so made to the registration authority¹¹ and any such proposal so made by the registration authority¹². When the registration authority refers an application or proposal to the Planning Inspectorate for determination:

- 368 (a) the registration authority must send to the Planning Inspectorate all material in its possession which is relevant to the determination of the application or proposal¹³; and
- 369 (b) in the case of an application, the Planning Inspectorate may direct the applicant to provide any further information or documents necessary to enable the application to be determined¹⁴.

The determining authority¹⁵ must, in determining any application or proposal, take into account:

- 370 (i) the contents of the application or proposal, and any material accompanying it;
- 371 (ii) in the case of an application, any further information or evidence provided by the applicant in accordance with a direction by the registration authority¹⁶ or the Planning Inspectorate¹⁷;
- 372 (iii) any written representations made¹⁸ by any person;
- 373 (iv) any oral representations made¹⁹ by any person;
- 374 (v) the findings made at a site inspection²⁰, if any; and
- 375 (vi) where a public inquiry²¹ or a hearing²² has been held by an inspector²³, either the evidence presented at the inquiry or hearing, if the determination is being made by the inspector who heard the evidence, or the report and recommendation of the inspector, if the determination is not being made by the inspector²⁴.

The determining authority may decide that a public inquiry is to be held in relation to any application or proposal²⁵. Where the Planning Inspectorate is the determining authority, it may decide that a hearing²⁶ is to be held in relation to any application or proposal²⁷.

The determining authority may, if it thinks it necessary to enable an application or proposal to be determined, invite further written representations about any specified matter from:

- 376 (A) the applicant, in the case of an application;
- 377 (B) the registration authority, in the case of a proposal;
- 378 (C) a person who has made representations²⁸; or
- 379 (D) any other person;

and may specify the time within which any such further representations must be made²⁹. Representations made pursuant to such an invitation must be signed³⁰ by the person making them³¹.

In relation to any application or proposal which the determining authority decides to determine without holding a public inquiry or (where the Planning Inspectorate is the determining authority) a hearing³², the determining authority:

- 380 (aa) may not refuse an application without first offering the applicant an opportunity to make oral representations³³; and
- 381 (bb) may not grant or refuse an application or proposal without first offering any person (other than the applicant) for whom the grant or refusal, as the case may be, would represent a determination of that person's civil rights an opportunity to make oral representations³⁴.

Where notice has been given³⁵ that a public inquiry or, where the Planning Inspectorate is the determining authority, a hearing is to be held in relation to the application or proposal, then a registration authority, where it is the determining authority, may³⁶ decide at any time before the start of a public inquiry to cancel the inquiry and determine the application without holding an inquiry³⁷. The registration authority must, however, consult the applicant before deciding to cancel a public inquiry in relation to an application³⁸. Where the Planning Inspectorate is the determining authority it may³⁹ decide at any time before the start of a public inquiry or hearing either to cancel the inquiry or hearing and determine the application without holding an inquiry or hearing, or to hold a hearing instead of an inquiry, or vice versa⁴⁰. The Planning Inspectorate must, however, consult the applicant, before deciding to change the procedure for determining an application, or the referring authority, before deciding to change the procedure for determining a proposal⁴¹.

1 As to the pilot areas in England see PARA 467 text and notes 29-30.

2 Ie subject to the Commons Registration (England) Regulations 2008, SI 2008/1961, reg 27(2): see the text and notes 9-12.

3 As to the meaning of 'application' for these purposes see PARA 507 note 10.

4 Ie made in accordance with the Commons Registration (England) Regulations 2008, SI 2008/1961. As to the making of applications see PARA 549.

5 As to the commons registration authorities see PARA 507.

6 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 27(1)(a).

7 As to the meaning of 'proposal' for these purposes see PARA 507 note 11.

8 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 27(1)(b). As to the making of proposals see PARA 551.

9 Ie the cases specified in the Commons Registration (England) Regulations 2008, SI 2008/1961, reg 27(3). Those cases are where (1) the registration authority has an interest in the outcome of the application or proposal such that there is unlikely to be confidence in the authority's ability impartially to determine it; (2) the application or proposal is made under the Commons Act 2006 s 19(4) (see PARA 534), and seeks (a) to add land to, or to remove land from, a register; or (b) to correct an error as to the quantification of rights of common in a register; or (3) the application or proposal is made under any of Sch 2 paras 4-9 (see PARA 537 et seq and, in

relation to applications and proposals with regard to town or village greens, **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 532 et seq), and seeks to add land to, or to remove land from, a register: Commons Registration (England) Regulations 2008, SI 2008/1961, reg 27(3). As to the meaning of 'land' for registration purposes see PARA 403 note 1.

10 As to the meaning of 'the Planning Inspectorate' see PARA 522 note 19.

11 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 27(2)(a).

12 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 27(2)(b).

13 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 27(4)(a).

14 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 27(4)(b).

15 As to the meaning of 'the determining authority' see PARA 522 note 19.

16 Ie a direction under the Commons Registration (England) Regulations 2008, SI 2008/1961, reg 20(2): see PARA 550.

17 Ie a direction under the Commons Registration (England) Regulations 2008, SI 2008/1961, reg 27(4): see the text and notes 13-14.

18 Ie in accordance with the Commons Registration (England) Regulations 2008, SI 2008/1961, reg 26 (see PARA 552), or in accordance with an invitation under reg 28(4) (see the text and notes 28-29).

19 Ie in accordance with the Commons Registration (England) Regulations 2008, SI 2008/1961, reg 28(6): see the text and notes 32-34.

20 Where an inspector is appointed to hold a public inquiry (see PARA 554), the inspector must (unless any permission necessary to do so is refused) inspect the land affected by the application or proposal before determining the application or proposal or producing a report to the determining authority: Commons Registration (England) Regulations 2008, SI 2008/1961, reg 34(1). In any other case, before an application or proposal is determined, the determining authority may conduct an inspection of the land affected by the application or proposal: reg 34(2). Before a site inspection is made under reg 34(1) or (2) in relation to an application, the inspector or determining authority must ask the applicant whether the applicant wishes to be present or represented: reg 34(3). If the applicant expresses a wish to be present or be represented, the inspector or determining authority must give the applicant reasonable notice of the date and time of the inspection, and give the applicant or his representative the opportunity to be present: reg 34(4). The inspection does not need to be postponed if the applicant or his representative is not present at the appointed time: reg 34(5).

21 As to public inquiries see PARA 554.

22 As to hearings see PARA 554.

23 As to the meaning of 'inspector' see PARA 540 note 11.

24 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 28(1).

25 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 28(2).

26 Ie a hearing in accordance with the Commons Registration (England) Regulations 2008, SI 2008/1961, reg 33: see PARA 554.

27 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 28(3).

28 Ie in accordance with the Commons Registration (England) Regulations 2008, SI 2008/1961, reg 26: see PARA 552.

29 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 28(4).

30 Ie except where electronic communications are used: see PARA 532 note 17.

31 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 28(5).

32 See note 26.

- 33 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 28(6), (7)(a).
- 34 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 28(6), (7)(b).
- 35 le under the Commons Registration (England) Regulations 2008, SI 2008/1961, reg 29: see PARA 554.
- 36 le subject to the Commons Registration (England) Regulations 2008, SI 2008/1961, reg 35(3): see the text and note 38.
- 37 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 35(1), (2).
- 38 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 35(3).
- 39 le subject to the Commons Registration (England) Regulations 2008, SI 2008/1961, reg 35(5): see the text and note 41.
- 40 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 35(4).
- 41 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 35(5).

UPDATE

553 Responsibility for, and method of, determining applications and proposals

NOTE 9--SI 2008/1961 reg 27(3) amended: SI 2009/2018.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/3. REGISTRATION OF COMMON LAND/(3) REGISTRATION UNDER THE COMMONS ACT 2006/(iii) The Registers/E. PROCEDURE FOR APPLICATIONS AND PROPOSALS IN THE PILOT AREAS/554. Public inquiries and hearings.

554. Public inquiries and hearings.

The following provisions apply in relation to the pilot areas in England¹.

If a public inquiry or a hearing is to be held in relation to an application or proposal to amend the registers², the determining authority³ must ensure that a notice of the inquiry or hearing is:

- 382 (1) published on an appropriate website⁴;
- 383 (2) served⁵ on:
 - 25 30. (a) the referring authority⁶, if the Planning Inspectorate⁷ is the determining authority;
 - 31. (b) in the case of an application, the applicant;
 - 32. (c) any person who has made representations⁸; and
 - 33. (d) any other person whom the determining authority invited⁹ to make written representations¹⁰;
- 26 384 (3) as the determining authority considers necessary:
 - 27 34. (a) published in such one or more newspapers circulating in the relevant area as appears to the determining authority to be sufficient to secure adequate publicity; and
 - 35. (b) publicised by such other means or served on such other persons as may be appropriate to bring the inquiry to the attention of persons likely to be affected by the application or proposal¹¹.
- 28

Where it has been decided that a public inquiry is to be held in relation to an application or proposal, the determining authority must appoint an inspector¹² to hold the inquiry and, if the inspector is not also to determine the application, to provide a report and recommendation to the determining authority¹³. Subject to the following provisions¹⁴ the procedure at the inquiry is to be determined by the inspector¹⁵. Any person interested in the subject-matter of an inquiry may appear at the inquiry in person or by a representative¹⁶. The inspector may, at any stage of an inquiry, prevent any person from giving evidence, cross-examining a person giving evidence, or presenting any matter, if the inspector considers it to be irrelevant or repetitious¹⁷. The inspector may also:

- 385 (i) require a person to leave an inquiry;
- 386 (ii) prevent a person from participating in the inquiry by giving evidence, cross-examining a person giving evidence, or presenting any matter; or
- 387 (iii) permit a person to remain at, or participate in, the inquiry only on specified conditions¹⁸.

The inspector may proceed with an inquiry in the absence of any person entitled to appear at it¹⁹ and may take into account any written representations or evidence or any other document received by the inspector from any person before or during an inquiry, provided that the

inspector discloses it at the inquiry²⁰. The inspector may also adjourn an inquiry to another date or adjourn an inquiry to the site of any land affected by the application or proposal, and conduct part of the inquiry at that site in conjunction with a site inspection²¹.

Where it has been decided to hold a public inquiry, the inspector may, if the inspector considers it desirable, hold a pre-inquiry meeting to determine the matters to be addressed and the procedure to be followed at the inquiry²². If the inspector decides to hold a pre-inquiry meeting, not less than 14 days' notice in writing must be given to the applicant (in the case of an application), to the registration authority, to any person who has made written representations about the application or proposal and to any other person whose presence at the pre-inquiry meeting the inspector considers desirable²³. The inspector may, at a pre-inquiry meeting, give directions about things to be done in preparation for the inquiry to the applicant (in the case of an application), to the registration authority and to any other person wishing to appear at the inquiry²⁴ and may specify a date or dates by which any such directions must be complied with²⁵. In particular, the inspector may direct any person wishing to give evidence to serve a written statement of that evidence on the inspector and on such other persons as the inspector may specify²⁶.

At the start of an inquiry, the inspector must identify the main issues to be considered at the inquiry²⁷; but this does not preclude other issues from being considered at the inquiry, or raised²⁸ by persons appearing at the inquiry²⁹. He must also identify any matters on which further explanation from any person appearing at the inquiry is required³⁰ and explain the procedure to be followed at the inquiry³¹. If a person giving evidence at the inquiry has provided a written statement of evidence in accordance with a direction³², the inspector may direct that the written statement is to be treated as the person's evidence, or as part of the person's evidence³³ and that other parties at the inquiry may cross-examine the person on the written statement³⁴.

Where the Planning Inspectorate decides that a hearing is to be held in relation to an application or proposal for which it is the determining authority, it must appoint an inspector to hold the hearing³⁵. A hearing is to take the form of a discussion led by the inspector³⁶. In the case of an application, the applicant is entitled³⁷ to give, or to call another person to give, oral evidence and any other person may³⁸ give oral evidence with the permission of the inspector³⁹. Cross-examination is not permitted unless the inspector decides that it is necessary to ensure a sufficient examination of the issues⁴⁰.

1 As to the pilot areas in England see PARA 467 text and notes 29-30.

2 As to the meanings of 'application' and 'proposal' for these purposes see PARA 507 notes 10, 11.

3 As to the meaning of 'the determining authority' see PARA 522 note 19.

4 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 29(1)(a).

5 As to the service of notices see PARA 532 note 17.

6 The 'referring authority' means, in relation to an application or proposal which has been referred to the Planning Inspectorate pursuant to the Commons Registration (England) Regulations 2008, SI 2008/1961, reg 27(2) (see PARA 553), the registration authority which referred it: regs 2(1), 27(5)(b). As to the commons registration authorities see PARA 507.

7 As to the meaning of 'the Planning Inspectorate' see PARA 522 note 19.

8 Ie in accordance with the Commons Registration (England) Regulations 2008, SI 2008/1961, reg 26: see PARA 552.

9 Ie under the Commons Registration (England) Regulations 2008, SI 2008/1961, reg 28(4)(d): see PARA 553.

10 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 29(1)(b).

- 11 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 29(1)(c). As to the meaning of 'relevant area' see PARA 534 note 13.
- 12 As to the meaning of 'inspector' see PARA 540 note 11.
- 13 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 30(1).
- 14 Ie subject to the Commons Registration (England) Regulations 2008, SI 2008/1961, regs 30(3)-(8), 32: see the text and notes 16-21, 27-34.
- 15 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 30(2).
- 16 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 30(3).
- 17 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 30(4).
- 18 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 30(5).
- 19 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 30(6).
- 20 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 30(7).
- 21 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 30(8). As to site inspections see PARA 553 note 20.
- 22 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 31(1). Regulation 30(2)-(6) (so far as relevant) applies to pre-inquiry meetings as it applies to inquiries: reg 31(3).
- 23 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 31(2).
- 24 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 31(4)(a).
- 25 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 31(4)(b).
- 26 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 31(5).
- 27 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 32(1)(a).
- 28 Ie subject to the inspector's powers under the Commons Registration (England) Regulations 2008, SI 2008/1961, reg 30(4): see the text and note 17.
- 29 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 32(2).
- 30 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 32(1)(b).
- 31 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 32(1)(c).
- 32 Ie a direction under the Commons Registration (England) Regulations 2008, SI 2008/1961, reg 31(5): see the text and note 26.
- 33 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 32(3)(a).
- 34 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 32(3)(b).
- 35 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 33(1). Regulation 30(2)-(8) (see the text and notes 15-21) applies to a hearing as it applies to a public inquiry: reg 33(3).
- 36 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 33(2).
- 37 Ie subject to the Commons Registration (England) Regulations 2008, SI 2008/1961, reg 30(4)-(6): see the text and notes 17-19. See also note 35.
- 38 See note 37.
- 39 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 33(4).
- 40 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 33(5).

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/3. REGISTRATION OF COMMON LAND/(3) REGISTRATION UNDER THE COMMONS ACT 2006/(iii) The Registers/E. PROCEDURE FOR APPLICATIONS AND PROPOSALS IN THE PILOT AREAS/555. Action to be taken following determination of application or proposal.

555. Action to be taken following determination of application or proposal.

The following provisions apply in relation to the pilot areas in England¹.

Where an application to amend the registers² is granted or a decision is made to give effect to a proposal to amend them³, in whole or in part, the registration authority⁴ must give effect to the determination in the appropriate register by addition, deletion, correction, or otherwise as may be appropriate⁵. The registration authority must give written notice⁶ of the determination to the applicant, if the determination was made upon an application, and to every person who made representations⁷ concerning the application or proposal⁸. Such notice must include reasons for the authority's decision and details of any changes made to the register to give effect to the decision⁹.

The registration authority must publish the decision in relation to any application or proposal, and the reasons for it, on its website¹⁰.

1 As to the pilot areas in England see PARA 467 text and notes 29-30.

2 As to the meaning of 'application' for these purposes see PARA 507 note 10.

3 As to the meaning of 'proposal' for these purposes see PARA 507 note 11.

4 As to the commons registration authorities see PARA 507.

5 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 37(1).

6 As to the method of giving notice see PARA 532 note 17.

7 As to making representations see PARA 552.

8 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 37(2).

9 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 37(3).

10 Commons Registration (England) Regulations 2008, SI 2008/1961, reg 37(4).

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/4. RIGHTS AND DUTIES OF FREEHOLDER AND COMMONERS/(1) RIGHTS AND DUTIES OF THE OWNER OF THE SOIL/556. Ownership subject to common rights.

4. RIGHTS AND DUTIES OF FREEHOLDER AND COMMONERS

(1) RIGHTS AND DUTIES OF THE OWNER OF THE SOIL

556. Ownership subject to common rights.

Subject to the restrictions created by modern legislation¹ and to any severance of rights such as mineral rights, the owner of the soil is owner at common law of everything upwards to the heavens and downwards to the centre of the earth except such things as custom, usage, or grant has conferred upon the commoners, and so long as he does not interfere with the commoners' rights, he may use the land and its produce as absolutely as if no right of common had place on it².

If sufficient common is left to the commoners, the owner of the soil by common law right, independently of any statute, may plant trees, breed rabbits, depasture cattle³, and grant licences to strangers to take the herbage and pasturage and other products of and in the soil⁴. The right of planting trees must necessarily be exercised only to a limited extent, as it involves interference with the pasturage, and if the commoners can prove insufficiency of pasture they are entitled to bring a claim against the owner of the soil, though they must not themselves cut down the trees⁵.

Much common land is, however, now subject to a notification⁶ by Natural England or the Countryside Council for Wales⁷ as a site of special scientific interest subject to controls on its use⁸ and may also be subject to a management scheme⁹. The use of common land may also be affected by European Community legislation; for example, ploughing up permanent pasture may prejudice claims to entitlements under the single farm payment scheme¹⁰. Additionally, under cross compliance rules the United Kingdom is required, subject to an exception for afforestation and to the ability to derogate from that requirement in justified circumstances, to ensure that land which was under permanent pasture as at 15 May 2003 is maintained under permanent pasture¹¹. Altering the character of open grassland may also risk losing grants under domestic legislation¹².

1 Eg such as relating to the rights of aerial traffic (see **AIR LAW**); and planning legislation (see **TOWN AND COUNTRY PLANNING**). See also the text and notes 6-12.

2 3 Cru Dig 73; Cooke's Inclosure Acts (4th Edn) 65; *Doe d Lowes v Davidson* (1813) 2 M & S 175 at 184 per Lord Ellenborough CJ; *Arlett v Ellis* (1827) 7 B & C 346 at 369 per Bayley J; *Hall v Byron* (1877) 4 ChD 667 at 675; *Robinson v Duleep Singh* (1879) 11 ChD 798 at 823. Except in relation to the pilot areas in England (to which the Commons Act 2006 Pt 1 (ss 1-25)) applies, application may be made to the registration authority under the Commons Registration Act 1965 to enter a note in the land section of the register of the rights and interests of the lord of the manor (in that capacity) other than the ownership of the soil: Commons Registration (General) Regulations 1966, SI 1966/1471, reg 24(1), (2)(d). See also PARA 515. As to the registration authorities see PARA 507; as to registration generally see PARA 506 et seq; and as to the pilot areas in England see PARA 467 text and notes 29-30.

3 As to the meaning of 'cattle', and as to the animals in respect of which rights of common may be exercised, see PARA 436 note 1.

4 See the cases cited in note 2. See further, as to the rights of holders of manorial rights, the *Report of the Royal Commission on Common Land 1955-1958* (Cmnd 462) para 180 et seq.

5 See *Kirby v Sadgrove* (1797) 1 Bos & P 13 (where Eyre CJ twice refers to a right of common as an easement instead of as a profit à prendre); *Arlett v Ellis* (1827) 7 B & C 346. Similar restraint had to be exercised in making a rabbit warren: see *Cooper v Marshall* (1757) 1 Burr 259; *Robinson v Duleep Singh* (1878) 11 ChD 798 at 809, CA. As to the statutory control of rabbits see **AGRICULTURAL PRODUCTION AND MARKETING** vol 1 (2008) PARAS 1922, 1923.

6 le under the Wildlife and Countryside Act 1981 s 28: see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 674 et seq.

7 As to Natural England and the Countryside Council for Wales see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARAS 523, 524.

8 As to the duties of the owner or occupier of any land included in a site of special scientific interest see the Wildlife and Countryside Act 1981 s 28E; and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 679.

9 As to management schemes for sites of special scientific interest see PARA 610; and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 686; and as to other schemes for the management of commons see PARA 590 et seq.

10 As to the single payment scheme see **AGRICULTURAL PRODUCTION AND MARKETING** vol 1 (2008) PARA 760 et seq.

11 See **AGRICULTURAL PRODUCTION AND MARKETING** vol 1 (2008) PARA 755.

12 As to grants under the Hill Farming Act 1946 for the improvement of land subject to rights of common see **AGRICULTURAL PRODUCTION AND MARKETING** vol 1 (2008) PARA 1336.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/4. RIGHTS AND DUTIES OF FREEHOLDER AND COMMONERS/(1) RIGHTS AND DUTIES OF THE OWNER OF THE SOIL/557. Pasturage for cattle.

557. Pasturage for cattle.

At common law, the right of the owner of the soil to have pasturage for his own cattle¹ on the common is one of the characteristics of land on which rights of common exist². Where a right is established to exclude the owner of the soil from the common, it will be found to be a sole or several pasture or herbage³ and not a right of common properly so-called⁴, although rights of sole or several pasture or herbage are included in the statutory definition of 'rights of common' for registration purposes⁵.

That right to pasture cattle may, however, be restricted where the common is a site of special scientific interest⁶. It may also be affected by rules relating to agricultural activities or the management of vegetation made⁷ by a commons council⁸.

1 As to the meaning of 'cattle', and as to the animals in respect of which rights of common may be exercised, see PARA 436 note 1.

2 Coke states (Co Litt 122a) that so long as the land continues to be a common no prescription can deprive him of the right, nor is it dependent upon there being a sufficiency of common for the other commoners. This statement of Coke although consistent with ancient authority (*White v Shirland* (1584) 1 Co Litt 122a; *Kenrick v Pargiter and Philips* (1611) 2 Brownl 60), does not appear to be fully supported by modern authority and it can be argued that the rights of commoners take precedence over the right of the owner of the common where, as in a particularly dry season, or under restrictions imposed by Natural England (see PARA 556) there is insufficient grass to satisfy all needs. Indeed an even earlier authority (Bracton f 229b) makes it clear that if the owner of a tenement subject to rights of common overstocks the land the commoners will have a remedy against him. In *Owen v Blathwayt* [2002] EWHC 2231 (Ch), [2003] 1 P & CR 444, [2002] All ER (D) 01 (Nov) (which was a case of express grant of a right of grazing 'in common with' others but which did not amount to a right of common and where the other graziers were agricultural tenants of the freeholder of the land) it was held that in case of an insufficiency caused by restrictions imposed by the requirements of English Nature the grazing should be abated proportionately. Where the owner of the common has (or the owner's lessees have) registered rights under the Commons Registration Act 1965 and the Commons Act 2006 those rights have probably become binding statutory rights even if they could not have existed at common law and would therefore rank on equal terms with those of other registered commoners. Where the owner wishes to use the surplus by agistment or otherwise the common law rules will continue to apply.

3 As to sole and several pasture and herbage see PARAS 452-469.

4 Co Litt 122a.

5 See PARA 405.

6 As to the duties of the owner or occupier of any land included in a site of special scientific interest see the Wildlife and Countryside Act 1981 s 28E; and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 679; and as to management schemes for sites of special scientific interest see PARA 610; and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 686.

7 Under the Commons Act 2006 s 31(3)(a) (not yet in force): see PARA 604.

8 As to commons councils see PARAS 601-603; and as to their functions see PARA 604 et seq.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/4. RIGHTS AND DUTIES OF FREEHOLDER AND COMMONERS/(1) RIGHTS AND DUTIES OF THE OWNER OF THE SOIL/558. Agistment.

558. Agistment.

The owner of the soil may license strangers to put their cattle¹ on the common, but not to the prejudice of the commoners so that they have insufficient common². Such a contract of agistment confers no interest in the land and therefore does not require to be in writing³.

The right to enter into a contract of agistment may, however, be restricted where the common is a site of special scientific interest⁴. It may also be affected by rules relating to agricultural activities or the management of vegetation made⁵ by a commons council⁶.

1 As to the meaning of 'cattle', and as to the animals in respect of which rights of common may be exercised, see PARA 436 note 1.

2 *Mellor v Spateman* (1669) 1 Saund 339 at 345 note 2; *Atkinson v Teasdale* (1772) 2 Wm Bl 817; *Greenhow v Ilsley* (1747) Willes 619. Where in a claim by a commoner for interference with his rights of common the defendant pleads a licence from the owner of the soil, he should aver that sufficient common is left: *Smith v Fetherwell* (1675) Freem KB 190.

3 See **ANIMALS** vol 2 (2008) para 721.

4 As to the duties of the owner or occupier of any land included in a site of special scientific interest see the Wildlife and Countryside Act 1981 s 28E; and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 679; and as to management schemes for sites of special scientific interest see PARA 610; and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 686.

5 See under the Commons Act 2006 s 31(3)(a) (not yet in force): see PARA 604.

6 As to commons councils see PARAS 601-603; and as to their functions see PARA 604 et seq.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/4. RIGHTS AND DUTIES OF FREEHOLDER AND COMMONERS/(1) RIGHTS AND DUTIES OF THE OWNER OF THE SOIL/559. Driving the common.

559. Driving the common.

At common law, the owner of the soil may drive the common at stated periods to ascertain whether the commoners have too many cattle¹ on the wastes or whether strangers' cattle are there². This custom has generally fallen into abeyance³.

The owner of the soil may drive the cattle of the commoners with those of strangers which he has seen to a convenient place to separate them without alleging any custom⁴. If the usage is at certain times in the year to drive the common to ascertain whether there are cattle of strangers there, or the common is surcharged, the custom must be shown⁵.

Power may be conferred on a commons council⁶ to remove any animals unlawfully permitted to graze on the common⁷.

1 As to the meaning of 'cattle', and as to the animals in respect of which rights of common may be exercised, see PARA 436 note 1. Established grazing rights required quantification on registration (see PARAS 435, 441, 447) and the Commons Act 2006 imposes restrictions on the creation of new rights of common of pasture, or the variation of existing rights, where in the opinion of the commons registration authority the number of animals would not be sustainable (see ss 6(6), 7(5) (not fully in force); and PARAS 467, 522).

2 The remedy of distress damage feasant which was available to the owner of the soil was abolished by the Animals Act 1971 s 7, which provides an alternative remedy: see **ANIMALS** vol 2 (2008) PARAS 758-759.

3 See the *Report of the Royal Commission on Common Land 1955-1958* (Cmnd 462) para 183.

4 *Thomas v Nichols* (1681) 3 Lev 40.

5 *Thomas v Nichols* (1681) 3 Lev 40.

6 As to commons councils see PARAS 601-603; and as to their functions see PARA 604 et seq.

7 See the Commons Act 2006 s 31(3)(f) (not yet in force); and PARA 604.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/4. RIGHTS AND DUTIES OF FREEHOLDER AND COMMONERS/(1) RIGHTS AND DUTIES OF THE OWNER OF THE SOIL/560. Shooting and game rights.

560. Shooting and game rights.

The right of the owner of the soil to shoot over and take game on the uninclosed¹ waste and commons within his freehold is a right that belongs to him by virtue of his ownership of the soil², not a licence or liberty incident to the lord of the manor, and he may thus grant the right as a profit à prendre to another separately from the ownership of the soil³.

1 As to the use of the terms 'inclose', 'inclosure' etc see PARA 418 note 2; and as to inclosure generally see PARA 418 et seq.

2 See *Brackenbank Lodge v Peart* [1996] NPC 124, (1996) Times, 26 July, HL.

3 *Ewart v Graham* (1859) 7 HL Cas 331; *Wickham v Hawker* (1840) 7 M & W 63, adopted in *Musgrave v Forster* (1871) LR 6 QB 590 at 592. As to game rights generally see **ANIMALS** vol 2 (2008) PARA 763 et seq; and as to profits à prendre see **EASEMENTS AND PROFITS A PRENDRE** vol 16(2) (Reissue) PARA 254 et seq.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/4. RIGHTS AND DUTIES OF FREEHOLDER AND COMMONERS/(1) RIGHTS AND DUTIES OF THE OWNER OF THE SOIL/561. Rights in respect of adjoining land.

561. Rights in respect of adjoining land.

The owner of the soil may have a right in respect of the waste of his own manor to turn cattle¹ on the waste of an adjoining manor, but such a right would be difficult to prove if there were old inclosed² lands of the adjoining manor in respect of which the right was also claimed³. This right is similar to the right of pasture by reason of vicinage⁴.

1 As to the meaning of 'cattle', and as to the animals in respect of which rights of common may be exercised, see PARA 436 note 1.

2 As to the use of the terms 'inclose', 'inclosure' etc see PARA 418 note 2; and as to inclosure generally see PARA 418 et seq.

3 *Earl of Sefton v Court* (1826) 5 B & C 917.

4 As to common of pasture by reason of vicinage see PARAS 448-451. It was held in *Tyrringham's Case* (1584) 4 Co Rep 36b at fo 38b that the owner of the soil might inclose his own manor against an adjoining manor where there was common of vicinage; however, the process of inclosure may now be considered obsolete (see PARA 419 note 1).

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/4. RIGHTS AND DUTIES OF FREEHOLDER AND COMMONERS/(1) RIGHTS AND DUTIES OF THE OWNER OF THE SOIL/562. Right to get minerals.

562. Right to get minerals.

The owner of the soil may sink shafts to work mines and use all necessary and lawful means to procure minerals¹ or other materials from the soil, doing as little damage as possible². He may dig brick earth³, and take gravel, marl, loam and subsoil, for his own use and for the purpose of sale⁴, and do other acts of a like nature, but he must always exercise rights of this nature in moderation, and not to excess or with wantonness⁵, and, unless he can prove a special custom, must not infringe upon the rights of the commoners⁶. The onus is on a commoner who complains of what is being done to show that his enjoyment of his common right has been hindered⁷.

The Commons Act 2006, however, now prohibits the carrying out of certain works on common land without the consent of the appropriate national authority⁸.

1 The right to work coal is subject to statutory limitations: see **MINES, MINERALS AND QUARRIES**. The winning or working of minerals may also require planning permission: see **TOWN AND COUNTRY PLANNING** vol 46(2) (Reissue) PARA 710 et seq.

2 *Coo v Cauthorn* (1662) 1 Keb 390; *Benfieldside Local Board v Consett Iron Co* (1877) 3 ExD 54. See also *Malvern Hills Conservators v Whitmore* (1909) 100 LT 841.

3 *Vin Abr, Common, Aa, 33*; *Lascelles v Lord Onslow* (1877) 2 QBD 433, DC.

4 *Hall v Byron* (1877) 4 ChD 667.

5 *Place v Jackson* (1824) 4 Dow & Ry KB 318.

6 *Hall v Byron* (1877) 4 ChD 667. Such a custom must, however, be reasonable: see *Wolstanton Ltd and A-G of Duchy of Lancaster v Newcastle-under-Lyme Corpn* [1940] AC 860, [1940] 3 All ER 101, HL.

7 *Malvern Hills Conservators v Whitmore* (1909) 100 LT 841.

8 See the Commons Act 2006 s 38 (not yet in force in relation to Wales); and PARA 612. As to the meaning of 'appropriate national authority' see PARA 411 note 1.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/4. RIGHTS AND DUTIES OF FREEHOLDER AND COMMONERS/(1) RIGHTS AND DUTIES OF THE OWNER OF THE SOIL/563. Rights subject to prescription or custom.

563. Rights subject to prescription or custom.

The owner of the soil may be controlled in the exercise of all his rights by prescription or custom, and a claim will lie against him at the suit of a commoner for a surcharge of any kind or for any unnecessary opening of the soil whereby the commoners' cattle¹ are injured².

1 As to the meaning of 'cattle', and as to the animals in respect of which rights of common may be exercised, see PARA 436 note 1.

2 See PARA 569 and the cases there cited.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/4. RIGHTS AND DUTIES OF FREEHOLDER AND COMMONERS/(1) RIGHTS AND DUTIES OF THE OWNER OF THE SOIL/564. Inclosures for special purposes.

564. Inclosures for special purposes.

Grants and inclosures¹ of small portions of common or waste lands for special purposes may be made by the owner of the soil under various statutory powers². These grants and inclosures are now subject to the restrictions imposed by the Commons Act 1899³. Furthermore, the Commons Act 2006 now prohibits the carrying out of certain works on common land without the consent of the appropriate national authority⁴.

1 As to the use of the terms 'inclose', 'inclosure' etc see PARA 418 note 2. Although many of the statutes relating to inclosure remain in force, the process itself may now be considered obsolete: see PARA 419 note 1. As to inclosure generally see PARA 418 et seq.

2 See eg the Inclosure Act 1773 s 15 (amended by the Statute Law Revision Act 1888).

3 See PARA 590 et seq.

4 See the Commons Act 2006 s 38 (not yet in force in relation to Wales); and PARA 612. As to the meaning of 'appropriate national authority' see PARA 411 note 1.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/4. RIGHTS AND DUTIES OF FREEHOLDER AND COMMONERS/(2) RIGHTS AND DUTIES OF COMMONERS/(i) As against the Owner of the Soil/565. Extent of a commoner's interest.

(2) RIGHTS AND DUTIES OF COMMONERS

(i) As against the Owner of the Soil

565. Extent of a commoner's interest.

The interest which a commoner has in the common is, in the legal phrase, to eat the grass with the mouths of his cattle¹, or to take such other produce of the soil as he may be entitled to. Apart from this, he must not meddle at all with the soil, nor with the fruit or produce, even though by doing so he may eventually improve and meliorate the common².

¹ As to the meaning of 'cattle', and as to the animals in respect of which rights of common may be exercised, see PARA 436 note 1.

² Adapted from 1 Roll Abr 406, quoted in 1 Saund 353a. As to the creation and proof of rights of common see PARA 467 et seq; and as to extinguishment of rights of common see PARA 493 et seq.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/4. RIGHTS AND DUTIES OF FREEHOLDER AND COMMONERS/(2) RIGHTS AND DUTIES OF COMMONERS/(i) As against the Owner of the Soil/566. Protection by abatement or claim.

566. Protection by abatement or claim.

Except in a few cases, the commoner is not allowed to take the law into his own hands and abate a nuisance which prevents his enjoyment of his rights of common. He may abate a nuisance which wholly excludes him from exercising his rights of common over the waste belonging to the owner of the soil without first resorting to the courts for relief, but if the nuisance amounts only to a partial exclusion, a sufficiency of common being left for the exercise of common rights, a commoner ought not to take the law into his own hands; his proper remedy is to apply to the court for a declaration of his rights or an injunction. This rule applies whether the right of common alleged to be infringed is for common of pasture or of turbary or of estovers¹.

Where the owner of the soil surcharges the common with his own stock, so that the commoner cannot enjoy his right in as full a manner as he ought, the commoner must not take the law into his own hands and distrain the surcharge²; his remedy is by legal proceedings³. Power may be conferred on a commons council⁴ to remove any animals unlawfully permitted to graze on the common⁵.

1 *Hope v Osborne* [1913] 2 Ch 349. On the limits of abatement see also *Burton v Winters* [1993] 3 All ER 847, [1993] 1 WLR 1077, CA. As to common of pasture generally see PARA 433 et seq; as to common of turbary see PARAS 457-458; and as to common of estovers see PARAS 459-460.

2 *Coney's Case* (1587) Godb 122; *Hall v Harding* (1769) 4 Burr 2426; *Cape v Scott* (1874) LR 9 QB 269. The remedy of distress damage feasant which was available to the owner of the soil was abolished by the Animals Act 1971 s 7, which provides an alternative remedy: see **ANIMALS** vol 2 (2008) PARAS 758-759.

3 *Hall v Harding* (1769) 4 Burr 2426 at 2430 per Lord Mansfield CJ, followed in *Cape v Scott* (1874) LR 9 QB 269; and see also *Anon* (1611) Godb 182. Cf *Kentick v Pargiter* (1608) Cro Jac 208; *Trulock v White* (1638) 1 Roll Abr 405, pl 6; *Atkinson v Teasdale* (1772) 2 Wm Bl 817; *Whiteman v King* (1791) 2 Hy Bl 4.

In a claim against the owner of the soil for surcharging, the commoner must particularly show the surcharge, though in a claim against a stranger he need not: *Smith v Feverell* (1675) 2 Mod Rep 6; and see PARA 574.

4 As to commons councils see PARAS 601-603; and as to their functions see PARA 604 et seq.

5 See the Commons Act 2006 s 31(3)(f) (not yet in force); and PARA 604.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/4. RIGHTS AND DUTIES OF FREEHOLDER AND COMMONERS/(2) RIGHTS AND DUTIES OF COMMONERS/(i) As against the Owner of the Soil/567. Abatement of fences etc.

567. Abatement of fences etc.

By the grant of the right of common the grantor gives everything which is incident to it, such as free ingress and egress: therefore, if the owner of the soil erects a wall, gate, hedge, or fence round the common, the commoner may abate the erection, because it is inconsistent with the terms of the grant¹; and where a fence has been erected upon a common inclosing and separating parts of it from the residue, and thereby interfering with the rights of the commoners, they are not by law restrained in the exercise of those rights to pulling down so much of the fence as is necessary to enable their cattle² to enter and feed upon the residue of the common, but are entitled to consider the whole of the fence as a nuisance and to remove it accordingly³. If, however, the fence is on other land which is no part of the common, but surrounds the common, a commoner can only abate so much of the erection as is necessary to make a way for his cattle to go into the common⁴. It must also be the case that fences surrounding poisonous trees or shrubs and dangerous grounds can be to the benefit rather than the disadvantage of commoners and cannot therefore be removed⁵.

A commoner may not fill up rabbit burrows⁶ or kill the rabbits, even though the owner of the soil surcharges the common by their maintenance, for the commoner has generally no right to interfere with the soil⁷.

A commoner cannot fill up a trench in the common cut by the owner of the soil, or dig down molehills, or cut the grass, wood, bushes, fern, or other things growing on the common⁸.

1 2 Roll Abr 145, W, pl 2; *Cooper v Marshall* (1757) 1 Burr 259; *Kirby v Sadgrove* (1797) 1 Bos & P 13 (affg *Sadgrove v Kirby* (1795) 6 Term Rep 483). As to the duty to fence see generally **BOUNDARIES** vol 4(1) (2002 Reissue) PARA 947 et seq.

2 As to the meaning of 'cattle', and as to the animals in respect of which rights of common may be exercised, see PARA 436 note 1.

3 *Arlett v Ellis* (1827) 7 B & C 346. In *National Trust for Places of Historic Interest or Natural Beauty v Ashbrook* [1997] 4 All ER 76 at 81 per Lindsay J, *Arlett v Ellis* (1827) 7 B & C 346 was explained as a case of authorising abatement where the plaintiff could not enjoy his common of pasture 'in so ample and beneficial manner as he otherwise might and would and ought to have done' and not as authority 'that any commoner might, on finding a fence on or about a common over which his rights existed, uproot that fence by way of abatement'. As to the use of the terms 'inclose', 'inclosure' etc see PARA 418 note 2; and as to inclosure generally see PARA 418 et seq.

4 *Arlett v Ellis* (1827) 7 B & C 346; *Sadgrove v Kirby* (1795) 6 Term Rep 483; *Howard v Spencer* (1665) 1 Sid 251. Cf *Mason v Caesar* (1676) 2 Mod Rep 65, which is clearly inconsistent with *Kirby v Sadgrove* (1797) 1 Bos & P 13 and *Arlett v Ellis*.

5 See *National Trust v Ashbrook* [1997] 4 All ER 76 at 81 per Lindsay J.

6 *Cooper v Marshall* (1757) 1 Burr 259. Cf *Horsey v Hagberton* (1609) Cro Jac 229.

7 *Hadesden v Gryssel* (1607) Cro Jac 195. See also PARA 565. It has, however, been suggested that a custom for the commoners to kill rabbits upon the waste may be good, though a custom for any one in the parish to do so would be unreasonable and bad: see *Coote v Ford* (1900) 83 LT 482; but cf *Duke of Portland v Hill* (1866) LR 2 Eq 765 at 768. As to the right of an occupier of land (including moorlands) to kill rabbits under the Ground Game Act 1880 and the Ground Game (Amendment) Act 1906 see **ANIMALS** vol 2 (2008) PARA 763 et seq.

8 *Howard v Spencer* (1665) 1 Sid 251; *Potter v North* (1669) 1 Saund 346 at 353a.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/4. RIGHTS AND DUTIES OF FREEHOLDER AND COMMONERS/(2) RIGHTS AND DUTIES OF COMMONERS/(i) As against the Owner of the Soil/568. Restrictions on the erection of buildings and fences and other works.

568. Restrictions on the erection of buildings and fences and other works.

The Commons Act 2006 prohibits the erection of fences or buildings and certain other works¹ on land²:

- 388 (1) registered as common land³;
- 389 (2) not so registered which is:
- 29
 - 36. (a) regulated by an Act made under the Commons Act 1876 confirming a provisional order of the Inclosure Commissioners⁴; or
 - 37. (b) subject to a scheme under the Metropolitan Commons Act 1866⁵ or the Commons Act 1899⁶;
- 30
 - 390 (3) not falling within head (1) or head (2) above which is in the New Forest and is subject to rights of common⁷,

without the consent of the appropriate national authority⁸. The relevant statutory provisions⁹ are discussed in detail in a later part of this title¹⁰.

It has been held that a commoner may pull down a building erected on the common which interferes with the exercise of his right, but that he cannot pull down an inhabited house¹¹ unless he has previously given notice of his intention to remove it¹².

Power may be conferred on a commons council¹³ to remove unlawful boundaries and other encroachments¹⁴.

1 As to the prohibited works see the Commons Act 2006 s 38 (not yet in force in relation to Wales); and PARA 612.

2 As to the meaning of 'land' for registration purposes see PARA 403 note 1.

3 As to the meaning of 'land registered as common land' see PARA 424 note 7.

4 As to the Inclosure Commissioners and their successors see PARA 423.

5 As to schemes under the Metropolitan Commons Act 1866 see **LONDON GOVERNMENT**.

6 As to schemes under the Commons Act 1899 see PARA 590 et seq.

7 As to the meaning of 'rights of common' see PARA 405.

8 See the Commons Act 2006 s 38 (not yet in force in relation to Wales); and PARA 612. As to the meaning of 'appropriate national authority' see PARA 411 note 1.

9 See the Commons Act 2006 Pt 3 (ss 38-44), Sch 4 (not fully in force in relation to Wales): see PARA 612 et seq.

10 See PARA 612 et seq. Until the Commons Act 2006 Pt 3 is brought into force in relation to Wales, the Law of Property Act 1925 s 194 (repealed in relation to England, and prospectively repealed in relation to Wales, by the Commons Act 2006 Sch 6 Pt 2), which imposes restrictions on the erection of buildings, fences and other works, continues to have effect there. For transitional provisions in relation to England see the Commons Act

2006 Sch 4 para 6; and the Commons Act 2006 (Commencement No 3, Transitional Provisions and Savings) (England) Order 2007, SI 2007/2584, art 3(4), (5).

11 *Perry v Fitzhowe* (1846) 8 QB 757, followed in *Jones v Jones* (1862) 1 H & C 1.

12 *Davis v Williams* (1851) 16 QB 546; and see *Lane v Capsey* [1891] 3 Ch 411 where Chitty J, though it was unnecessary to decide the point, was clearly of opinion that *Davis v Williams* (1851) 16 QB 546 was to be followed. Demolition of buildings now falls within the statutory definition of 'building operations' in the Town and Country Planning Act 1990 and thus requires planning permission (see **TOWN AND COUNTRY PLANNING** vol 46(1) (Reissue) PARA 218); general permission is given by the Town and Country Planning (General Permitted Development) Order 1995, SI 1995/418, Sch 2 Pt 31, subject to certain exceptions and conditions (see **TOWN AND COUNTRY PLANNING** vol 46(1) (Reissue) PARAS 412-414). Demolition of an inhabited house may, however, be a breach of the Protection from Eviction Act 1977.

13 As to commons councils see PARAS 601-603; and as to their functions see PARA 604 et seq.

14 See the Commons Act 2006 s 31(3)(e) (not yet in force); and PARA 604.

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569. Remedy through the courts.

In all cases of interference with rights of common by the owner of the soil, except the absolute exclusion of the commoner and his beasts, the remedy of the commoner is a claim for damages with, if necessary, a claim for an injunction¹.

A claim may be brought by an individual commoner against the owner of the soil for interference with rights of common by surcharging the common with his own stock leaving insufficiency of pasture, or for digging marl, loam, sand, etc to the detriment of the pasturage².

Having regard to the risk which a commoner may run if he himself removes or abates any inclosure, encroachment or nuisance which interferes with his exercise of his common rights³, in most cases it is safer for him to obtain an order from the court for the removal or abatement of the inclosure, encroachment or nuisance⁴.

1 Formerly the remedy was by an action on the case or an assize, ie a writ of assize for admeasurement of the common: see *Hadesden v Gryssel* (1607) Cro Jac 195; *Cooper v Marshall* (1757) 1 Burr 259; *Kirby v Sadgrove* (1797) 1 Bos & P 13. See also *Hope v Osborne* [1913] 2 Ch 349. For a description of the assize for admeasurement of the common see 3 Bl Com 238, quoted in Williams on Commons 121.

2 See PARA 566.

3 See eg PARA 567. As to the use of the terms 'inclose', 'inclosure' etc see PARA 418 note 2; and as to inclosure generally see PARA 418 et seq.

4 See *Robertson v Hartopp* (1889) 43 ChD 484 at 496, CA, per Stirling J; *Arlett v Ellis* (1827) 7 B & C 346; and the other cases referred to in PARA 567 notes 1-5. The application for an order should be made without delay, as otherwise the court in the exercise of its discretion may refuse a mandatory order: *Wimbledon and Putney Commons Conservators v Nicol* (1894) 10 TLR 247. Nor should the complainant stand by and allow the defendant to act to his detriment: *Symonds v Malvern Hills District Council* (1978) 248 Estates Gazette 238.

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570. Jurisdiction of county courts.

The county court within whose jurisdiction any common or part of a common is situated may hear any case relating to any illegal inclosure¹ of, or encroachment upon, the common or part of it, or relating to any nuisance impeding the exercise of any right of common; and it may grant an injunction against the inclosure, encroachment or nuisance, or order the removal or abatement of the same².

1 As to the use of the terms 'inclose', 'inclosure' etc see PARA 418 note 2; and as to inclosure generally see PARA 418 et seq.

2 Commons Act 1876 s 30 (amended by the Commons Act 2006 Sch 6 Pt 2). Proceedings are commenced in the ordinary way: see **CIVIL PROCEDURE** vol 11 (2009) PARA 116 et seq. As to county courts generally see **COURTS** vol 10 (Reissue) PARA 701 et seq.

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571. Representative claims.

Any number of claimants or defendants may be joined as parties to a claim¹. Where a claimant claims a remedy to which some other person is jointly entitled with him, all persons jointly entitled to the remedy must, unless the court orders otherwise, be parties to the claim². However, care has to be taken in deciding what classes can be represented in a claim, and the earlier cases³ may afford a guide⁴.

A judgment made against representative defendants will bind other persons who are not parties to the claim, whose interest is similar to that of the representative defendants or some of them, unless such other persons can show fraud or collusion, or show that the court has been misled by the case being not properly fought or fairly represented, or that there is some special ground of exception, all of which defences are open when the decision establishes only general rights⁵. A claim in such a case against a person who was not represented in the original claim is not a supplemental proceeding, but an original claim, and any restrictions upon bringing claims imposed by the decree must be complied with⁶.

A commons council which is established as a body corporate⁷ may have power to bring, or may be a defendant to, a claim⁸.

1 CPR 19.1. See further in connection with the joinder of parties **CIVIL PROCEDURE** vol 11 (2009) PARA 210 et seq.

2 CPR 19.3(1). If any person does not agree to be a claimant, he must be made a defendant, unless the court orders otherwise: CPR 19.3(2).

3 I.e. those decided before the introduction of the Civil Procedure Rules in 1998.

4 See eg *Powell v Earl of Powis* (1826) 1 Y & J 159; *Smith v Earl Brownlow* (1870) LR 9 Eq 241; *Warrick v Queen's College, Oxford* (1871) 6 Ch App 716; *Phillips v Hudson* (1867) 2 Ch App 243; *Betts v Thompson* (1871) 6 Ch App 732; cf *York Corpn v Pilkington* (1737) 1 Atk 282. Such an action was formerly in the nature of a bill of peace.

5 *London Sewers Comrs v Gellatly* (1876) 3 ChD 610.

6 *London Sewers Comrs v Gellatly* (1876) 3 ChD 610.

7 I.e. a commons council established under the Commons Act 2006 s 26: see PARA 601.

8 This follows from the Commons Act 2006 s 32(1) (ancillary powers: see PARA 605) and s 34(4) (power to bring prosecution, implying legal capacity: see PARA 607).

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572. Effect of partial sowing on rights of common.

Where a person has common in a field while it is not sown, the owner of the soil will not be able to defeat the right of the commoner by sowing only part of it. In such a case, it has been held that the commoner is entitled to common in the residue, for otherwise a part might be sown every year to deprive the commoner of his right¹. It may be evident from the register² whether or not a right of common is limited to grazing rights only over unsown parts of arable land.

1 *Trulock v Rigsby* (1610) Yelv 185.

2 As to registration see PARA 506 et seq.

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573. No liability for damage caused by exercise of rights.

In the due course of the exercise of his rights the commoner is not answerable to the owner of the soil for any damage which is suffered by the latter as the result of his own negligence or default as, for instance, if he leaves a stack of corn on the land and it is eaten by the commoner's cattle¹.

¹ *Farmor v Hunt* (1611) Cro Jac 271. As to the meaning of 'cattle', and as to the animals in respect of which rights of common may be exercised, see PARA 436 note 1.

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(ii) As against Other Commoners

574. Surcharging.

In many respects the rights and remedies of a commoner against another commoner who prevents him from enjoying his right of common to its full extent by surcharging the common, are the same as against the owner of the soil: he is not entitled to constitute himself a judge in his own case where cattle¹ or other stock are on the common under colour of a right, even though that right may be exceeded, and therefore he could not formerly distrain the cattle of another commoner, his remedy being by bringing a claim².

It is no defence to a claim for surcharging the common that the claimant himself has surcharged³, and the claimant need not show that he had turned on any cattle of his own at the time of the surcharge but only that he could not have enjoyed his common as beneficially as he ought⁴.

A commoner may maintain a claim for surcharge where the right of common claimed is common of vicinage⁵.

Power may be conferred on a commons council⁶ to make rules with regard to the management of vegetation and the exercise of rights of common⁷ to enforce any rules so made⁸. Where, however, a common is managed by an informal committee that body has no legal powers beyond those conferred by agreement⁹.

1 As to the meaning of 'cattle', and as to the animals in respect of which rights of common may be exercised, see PARA 436 note 1.

2 *Atkinson v Teasdale* (1772) 2 Wm BI 817; *Hall v Harding* (1769) 4 Burr 2426; *Whiteman v King* (1791) 2 Hy BI 4. The remedy of distress damage feasant which was available to the owner of the soil was abolished by the Animals Act 1971 s 7, which provides an alternative remedy which provides an alternative remedy extending to occupiers: see **ANIMALS** vol 2 (2008) PARAS 758-759. It is uncertain whether or not a commoner is an occupier for these purposes. Under the Commons Registration Act 1965 s 15 (see PARAS 435, 441, 447) an application for provisional registration of a right of common of pasture has to quantify the number of animals claimed, and, when the registration of such a right has become final, the right is exercisable in relation to animals not exceeding the number or numbers registered or such other number or numbers as Parliament may determine. As to the registration of new common land see PARA 516 note 20. Under the Commons Act 2006, the creation of a new right of common consisting of a right to graze animals is not to be registered if in the opinion of the commons registration authority the land over which the right is exercisable would be unable to sustain the exercise of that right taken with any other rights exercisable over that land (see s 6(6) (not fully in force); and PARA 467); and similar restrictions apply to the variation of any such right of common (see s 7(5) (not fully in force); and PARA 522).

3 Com Dig, Common, I; *Hobson v Todd* (1790) 4 Term Rep 71.

4 Com Dig, Common, I; *Wells v Watling* (1779) 2 Wm BI 1233.

In a claim by one commoner against another for surcharging, the claimant need not particularly show the surcharge (*Atkinson v Teasdale* (1772) 2 Wm BI 817), but in a claim against the owner of the soil he must (*Smith v Feverell* (1675) 2 Mod Rep 6).

5 *Cape v Scott* (1874) LR 9 QB 269. As to common by reason of vicinage see PARAS 448-451.

6 As to commons councils see PARAS 601-603; and as to their functions see PARA 604 et seq.

7 See the Commons Act 2006 s 31(a) (not yet in force); and PARA 604.

8 See the Commons Act 2006 s 34 (not yet in force); and PARA 607.

9 See *Hall v Moore*[2009] EWCA Civ 201, [2009] All ER (D) 235 (Mar), where such a committee was not able to bind a person exercising rights of common (as a tenant of the dominant freeholders) who had not agreed to a suspension of grazing rights.

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575. Encroachment.

One commoner can maintain a claim against a fellow commoner for wrongful acts by which the former's right of common is destroyed or interfered with, or which, unless stopped, will grow into a legal right to the prejudice of the rights of common of other commoners. The wrongful act may be restrained by injunction, and it is not necessary to prove actual pecuniary damage. The same principle would apply in the case of encroachment¹. The county court may make an order for the removal or abatement of an illegal inclosure or encroachment or of any nuisance impeding the lawful exercise of any right of common².

Powers may be conferred on a commons council³ to remove unlawful boundaries and other encroachments⁴.

Any person may apply to the county court for an enforcement order where restricted works⁵ have been carried out on a common without the consent of the appropriate national authority⁶.

1 *King v Brown, Durant & Co* [1913] 2 Ch 416.

2 See the Commons Act 1876 s 30; and PARAS 568-570. As to the use of the terms 'inclose', 'inclosure' etc see PARA 418 note 2; and as to inclosure generally see PARA 418 et seq.

3 As to commons councils see PARAS 601-603; and as to their functions see PARA 604 et seq.

4 See the Commons Act 2006 s 31(3)(e) (not yet in force); and PARA 604.

5 As to the meaning of 'restricted works' see PARA 612.

6 See the Commons Act 2006 s 41(1); and PARA 615. As to the meaning of 'appropriate national authority' see PARA 411 note 1.

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576. Diseased cattle.

In many manors there were customary byelaws with reference to turning out diseased cattle¹ or stock upon the waste; but it does not appear that, in the absence of such a custom, a commoner would have any remedy against another commoner who turned out diseased stock². Power may, however, be conferred on a commons council³ to make rules relating to the exercise of rights of common⁴ on the land for which the council is established⁵ and to enforce those rules⁶.

1 As to the meaning of 'cattle', and as to the animals in respect of which rights of common may be exercised, see PARA 436 note 1.

2 The question whether the owner of the soil was justified in impounding a mangy mare upon a common was discussed in *Palmer v Stone* (1759) 2 Wils 96, but the case turned upon pleadings which were bad on both sides, and was eventually decided on a plea of a custom of the forest of Waltham. As to statutory regulations relating to turning out diseased animals see **ANIMALS** vol 2 (2008) PARA 1072 et seq; and see also **ANIMALS** vol 2 (2008) PARA 751. As to the possible criminal liability for turning out a horse or other animal known to be dangerous upon a common where there are numerous public footpaths see *R v Dant* (1865) Le & Ca 567; as to civil liability for damage by dangerous animals see **ANIMALS** vol 2 (2008) PARA 747 et seq; and as to the restrictions on turning out on to a common male animals which have not been castrated see PARAS 599-600.

3 As to commons councils see PARAS 601-603; and as to their functions see PARA 604 et seq.

4 As to the meaning of 'rights of common' see PARA 405.

5 See the Commons Act 2006 s 31(3)(a) (not yet in force); and PARA 604.

6 See the Commons Act 2006 s 34 (not yet in force); and PARA 607.

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(iii) As against Strangers

577. Actual damage unnecessary.

Any act of a stranger whereby the commoner is prevented from having the use and enjoyment of his right of common in as ample and beneficial a manner as he otherwise would is a legal injury, for which a claim will lie, even though no actual damage is proved¹. Therefore, in bringing a claim against a stranger who has put his beasts on the common land, it is not necessary for a commoner to show that he has not sufficiency of pasture left; it is sufficient to prove that the beasts of the stranger consumed the grass. This follows the principle that where beasts are on a common under colour of a right it is necessary to prove damage of insufficiency of pasture, but that where there is no colour of right the commoner may take the matter into his own hands².

Consequently, if a stranger turns beasts upon the common, a commoner may chase them off the common³.

Power may be conferred on a commons council⁴ to remove animals unlawfully permitted to graze on the common⁵.

¹ *Robertson v Hartopp* (1889) 43 ChD 484 at 500 per Stirling J, summing up the law as gathered from Lord Coke in *Mary's Case* (1612) 9 Co Rep 111b; *Wells v Watling* (1779) 2 Wm Bl 1233; *Hobson v Todd* (1790) 4 Term Rep 71; and *Pindar v Wadsworth* (1802) 2 East 154. See also *King v Brown, Durant & Co* [1913] 2 Ch 416. In *Walker v Murphy* (1913) 77 JP 365, an interlocutory (interim) injunction was granted to restrain an act which tended to reduce the amount of pasturage, the pasturage as it stood being insufficient for the number of cows which there was a right to pasture upon the common. See also *Walker v Murphy* [1915] 1 Ch 71, CA. No claim, however, will lie where the damage is caused by the lawful user of his land by an adjoining owner: *George v Lysaght and Meade-King* (1883) 49 LT 49. As to the limited right of access given to the public by the Law of Property Act 1925 s 193 see PARA 581.

² See PARA 566 et seq. As to the measure of damages see *Walker v Murphy* [1915] 1 Ch 71, CA.

³ *Atkinson v Teasdale* (1772) 2 Wm Bl 817 at 818 per De Grey CJ; *Dixon v James* (1698) Freem KB 273; *Pindar v Wadsworth* (1802) 2 East 154. Formerly he could have detained them by way of distress damage feasant, but that right has been abolished by the Animals Act 1971, which provides an alternative remedy extending to occupiers: see the Animals Act 1971 s 7; and **ANIMALS** vol 2 (2008) PARAS 758-759. It is uncertain whether or not a commoner is an occupier for these purposes.

⁴ As to commons councils see PARAS 601-603; and as to their functions see PARA 604 et seq.

⁵ See the Commons Act 2006 s 31(3)(f) (not yet in force); and PARA 604.

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578. Remedies of a commoner.

The remedies which a commoner has against a stranger in respect of an illegal inclosure¹ or encroachment or nuisance impeding the lawful exercise of his common rights are similar to those he has against the owner of the soil or another commoner².

1 As to the use of the terms 'inclose', 'inclosure' etc see PARA 418 note 2, and as to inclosure generally see PARA 418 et seq.

2 See PARAS 567, 575. As to the rights of a commoner to prevent inclosure or encroachment see PARA 568.

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(iv) Restraint of Animals Straying onto the Highway

579. Animals straying onto the highway.

There is no general common law obligation on the part of the owner or occupier of land adjoining a highway to fence his land in order to keep his animals off the highway, the rules of common law relating to liability for negligence in such matters having been abolished¹, and where damage is caused by animals straying from unfenced land on to a highway a person who placed them on the land is not to be regarded as having committed a breach of the duty to take care if:

- 391 (1) the land is common land², or is land situated in an area where fencing is not customary, or is a town or village green³; and
- 392 (2) he had a right to place the animals on that land⁴.

However, once an animal strays beyond the point where the common land and highway co-exist, the owner is liable⁵.

1 See the Animals Act 1971 s 8(1); and **ANIMALS** vol 2 (2008) PARA 754.

2 As to the meaning of 'common land' see PARA 407 (definition for the purposes of the Commons Registration Act 1965 applied by the Animals Act 1971 s 11). However, as from a day to be appointed under the Commons Act 2006 s 56(1), that definition is repealed and replaced by the following definition for these purposes, ie 'common land' means (1) land registered as common land in a register of common land kept under the Commons Act 2006 Pt 1 (ss 1-25) (not fully in force); (2) land to which Pt 1 does not apply and which is subject to rights of common within the meaning of the 2006 Act: see the Animals Act 1971 s 11 (definition prospectively substituted by the Commons Act 2006 Sch 5 para 2). As to the register of common land kept under the Commons Act 2006 Pt 1 see PARA 526 et seq; as to the land to which Pt 1 does not apply see s 5; and PARA 411; and as to the meaning of 'rights of common' see PARA 405.

3 Animals Act 1971 s 8(2)(a). As to town and village greens see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 532 et seq.

4 Animals Act 1971 s 8(2)(b). The defence extends to licensees of commoners: *Davies v Davies*[1975] QB 172, [1974] 3 All ER 817, CA. As to liability for damage and expenses due to trespassing livestock see the Animals Act 1971 ss 4, 5; and **ANIMALS** vol 2 (2008) PARAS 749, 755-756. As to the liability to fence against animals see *Coaker v Willcocks*[1911] 2 KB 124, CA (owner of land adjoining a common is only bound to maintain such fences as are sufficient to keep out ordinary commonable animals and not those of special jumping propensities); *Jones v Price*[1965] 2 QB 618, [1965] 2 All ER 625, CA (right to require the owner of adjoining land to keep a boundary fence in repair is a right which the law will recognise as a quasi easement and which can be acquired by prescription); *Crow v Wood*[1971] 1 QB 77, [1970] 3 All ER 425, CA (right to have one's neighbour keep up fences is a right which lies in grant and is of such a nature that it can pass under the Law of Property Act 1925 s 62); *Egerton v Harding*[1975] QB 62, [1974] 3 All ER 689, CA (duty to fence can arise from custom). See further **BOUNDARIES** vol 4(1) (2002 Reissue) PARAS 948-954. As to the Law of Property Act 1925 s 62 see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 236; **EASEMENTS AND PROFITS A PRENDRE** vol 16(2) (Reissue) PARA 57.

5 *Rees v Morgan* (1976) 240 Estates Gazette 787, DC.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/5. PUBLIC RIGHTS OF ACCESS OVER COMMONS/(1) RIGHTS OF ACCESS/580. Rights of access conferred by statute; in general.

5. PUBLIC RIGHTS OF ACCESS OVER COMMONS

(1) RIGHTS OF ACCESS

580. Rights of access conferred by statute; in general.

There are a number of statutory systems safeguarding the public right of access over open spaces including commons and lands subject to rights of common¹. The Countryside and Rights of Way Act 2000 introduces a system whereby registered common land² is designated as 'access land'³, to which the public is entitled, subject to specific statutory restrictions and exclusions⁴, to enter and remain for the purposes of open-air recreation on foot⁵. Although the 2000 Act is now the principal statute enabling public right of access over common land, there remain a number of older statutory provisions relating to rights of access over the countryside generally which include common land within their scope. Local authorities are empowered to provide and maintain country parks or pleasure grounds⁶ and to acquire common land⁷, compulsorily if necessary, in the interests of persons resorting to the land for open-air recreation⁸. At the date at which this volume states the law, they may also continue to make access agreements⁹ with landowners, and access orders¹⁰, in respect of land which is open country¹¹ for the purposes of open-air recreation¹²; but such agreements and orders will no longer be possible once the provision of the Countryside and Rights of Way Act 2000 providing that they may no longer be made¹³ is brought into force¹⁴.

A commons council¹⁵ must discharge its functions having regard, among other things, to the protection of public rights of access to any area of land¹⁶.

Where it appears to the appropriate national authority¹⁷ that a person is carrying out, or causing to be carried out by virtue of any arrangements, an unauthorised agricultural activity¹⁸ on land which is registered as common land or as a town or village green¹⁹ and that the activity is detrimental to, among other things, the protection of public rights of access to any area of land, the appropriate national authority may take enforcement action²⁰.

The appropriate national authority may not exercise its statutory powers to make certain orders²¹ to the extent that to do so would have the effect of abolishing or restricting a right of access of whatever nature exercisable by members of the public generally or by any section of the public²².

1 Prior to the coming into force of the substantive provisions of the Countryside and Rights of Way Act 2000 Pt I (ss 1-46) (see the text and notes 2-5; and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 578 et seq) there was a statutory right of public access over only 20% of the common land in England and Wales: see the *Report of the Stakeholder Working Group on Agricultural Use and Management of Common Land* (April 2003; PB 8285) App A.

2 As to the registration of common land see PARA 506 et seq.

3 For these purposes, 'access land' means any land which (1) is shown as open country on a map in conclusive form issued by the appropriate countryside body for the purposes of the Countryside and Rights of Way Act 2000 Pt I (as to such maps see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 580); (2) is shown on such a map as registered common land; (3) is registered common land in any area outside Inner London for which no such map relating to registered common land has been issued; (4) is situated more than 600 metres above sea level in any area for which no such map relating to open country has been issued; or (5) is dedicated for the purposes of Pt I under s 16 (see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 580); but does not (in

any of those cases) include excepted land or land which is treated by s 15(1) (see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 580) as being accessible to the public apart from the 2000 Act: s 1(1). 'The appropriate countryside body' means, in relation to England, Natural England, and in relation to Wales, the Countryside Council for Wales: s 1(2) (definition amended by the Natural Environment and Rural Communities Act 2006 Sch 11 Pt 1 para 154). 'Excepted land' means land which is for the time being of any of the descriptions specified in the Countryside and Rights of Way Act 2000 Sch 1 Pt I, those descriptions having effect subject to Sch 1 Pt II (see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 578 et seq); 'mountain' includes, subject to the following definition, any land situated more than 600 metres above sea level; 'mountain, moor, heath or down' does not include land which appears to the appropriate countryside body to consist of improved or semi-improved grassland; and 'open country' means land which appears to the appropriate countryside body to consist wholly or predominantly of mountain, moor, heath or down, and which is not registered common land: s 1(2). For the purposes of Pt I, 'registered common land' means (a) at the date at which this volume states the law, (i) land which is registered as common land under the Commons Registration Act 1965 and whose registration under that Act has become final, or (ii), subject to the Countryside and Rights of Way Act 2000 s 1(4), land which fell within head (i) on 30 November 2000 (ie the day on which the 2000 Act was passed) or at any time after that day but has subsequently ceased to be registered as common land under the 1965 Act on the register of common land in which it was included being amended by reason of the land having ceased to be common land within the meaning of that Act; (b) as from a day to be appointed under the Commons Act 2006 s 56(1), land which is registered as common land in a register of common land kept under the Commons Act 2006 Pt 1 (ss 1-25) (not fully in force): Countryside and Rights of Way Act 2000 s 1(3) (prospectively amended, so as to substitute for the definition set out head (a) above the definition set out in head (b) above, by the Commons Act 2006 Sch 5 para 7(1)-(3), Sch 6 Pt 1). Head (a)(ii) above does not apply where: (A) the amendment of the register of common land was made in pursuance of an application made before 30 November 2000; or (B) the land ceased to be common land by reason of the exercise of any power of compulsory purchase, of appropriation or of sale which is conferred by an enactment, or of any power so conferred under which land may be made common land within the meaning of the 1965 Act in substitution for other land: Countryside and Rights of Way Act 2000 s 1(4) (prospectively repealed by the Commons Act 2006 Sch 6 Pt 1).

4 As to the restrictions to be observed by persons exercising the right of access see the Countryside and Rights of Way Act 2000 Sch 2; and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 583; and for provisions excluding or restricting access see Pt I Ch II (ss 21-33); and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARAS 583, 594 et seq.

5 See the Countryside and Rights of Way Act 2000 s 2, Sch 2; and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 583.

6 See the Countryside Act 1968 s 7; and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 566.

7 As to the meaning of 'common land' for these purposes see PARA 429 note 5.

8 See the Countryside Act 1968 s 9, Sch 2; and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 568. Note that the definition of 'open-air recreation' set out in note 12 does not apply for these purposes: s 21(6).

9 I.e. agreements under the National Parks and Access to the Countryside Act 1949 Pt V (ss 59-83): see s 59(1)(a); and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 581 et seq.

10 I.e. orders under the National Parks and Access to the Countryside Act 1949 Pt V: see s 59(1)(a); and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 581.

11 For these purposes, 'open country' means any area consisting wholly or predominantly of mountain, moor, heath, down, cliff or foreshore (including any bank, barrier, dune, beach, flat or other land adjacent to the foreshore), and, if in the countryside, any woodlands, any river or canal, any expanse of water through which a river, or some part of the flow of a river, runs, and certain land adjacent to such a river or canal: see the National Parks and Access to the Countryside Act 1949 s 59(2); the Countryside Act 1968 s 16(1)-(3); and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 582.

12 See the National Parks and Access to the Countryside Act 1949 Pt V; the Countryside Act 1968 ss 16-21; and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 582 et seq. For these purposes, 'open-air recreation' does not include organised games: National Parks and Access to the Countryside Act 1949 s 114(1); Countryside Act 1968 s 21(6). Land to which the public has a right of access under the Law of Property Act 1925 (see PARA 581) is excepted for the purpose of these provisions, and the rights of the public over such land are curtailed: National Parks and Access to the Countryside Act 1949 ss 60(1) proviso, (5)(h), 67(3)(a); and see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARAS 584, 617.

13 I.e. the Countryside and Rights of Way Act 2000 s 46(2): see note 14.

14 No access agreement or access order under the National Parks and Access to the Countryside Act 1949 Pt V (access to open country) may be made after the commencement of the Countryside and Rights of Way Act 2000 s 46(2) in relation to land which is open country or registered common land for the purposes of Pt I: s 46(2) (not yet in force; amended by the Commons Act 2006 Sch 5 para 7(1), (5)).

15 As to commons councils see PARAS 601-603; and as to their functions see PARA 604 et seq.

16 See the Commons Act 2006 31(6)(b), (7)(c); and PARA 604.

17 As to the meaning of 'appropriate national authority' see PARA 411 note 1. Note, however, that at the date at which this title states the law, the Commons Act 2006 s 46 (see the text and notes 18-20) was not in force in relation to Wales.

18 As to the meaning of 'unauthorised agricultural activity' see PARA 611 note 6.

19 As to the meanings of 'land registered as common land' and 'land registered as a town or village green' see PARA 424 notes 7, 12.

20 See the Commons Act 2006 s 46 (not yet in force in relation to Wales); and PARA 611.

21 In its power under the Commons Act 2006 s 36 to make, by order under s 26 (see PARA 601), any provision specified in s 36(2): see PARA 601 note 8.

22 See the Commons Act 2006 s 36(3); and PARA 601 note 8.

UPDATE

580 Rights of access conferred by statute; in general

NOTE 3--Definitions of 'access land' and 'open country' and the Countryside and Rights of Way Act 2000 s 1(3) amended: Marine and Coastal Access Act 2009 s 303(2).

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/5. PUBLIC RIGHTS OF ACCESS OVER COMMONS/(1) RIGHTS OF ACCESS/581. Access rights over commons and waste lands under the Law of Property Act 1925.

581. Access rights over commons and waste lands under the Law of Property Act 1925.

Members of the public¹ have rights of access for air and exercise² to any land³ (except as mentioned below) which is a metropolitan common⁴, a manorial waste⁵, or a common which is wholly or partly situated within an area which immediately before 1 April 1974 was a borough or urban district, and to any land which at 1 January 1926 was subject to rights of common and to which those rights of access may from time to time be applied⁶.

Such rights of access:

- 393 (1) are subject to any Act, scheme or provisional order for the regulation of the land⁷, to any byelaw, regulation or order made thereunder or under any other statutory authority⁸, and to any limitations and conditions imposed⁹ for the purpose of protecting the land¹⁰;
- 394 (2) do not include any right to draw or drive upon the land a carriage, cart, caravan, truck or other vehicle, or to camp or light any fire on the land¹¹; and
- 395 (3) cease to apply to any land over which the commonable rights are extinguished¹².

These rights of access continue to exist notwithstanding that land to which they are applicable is not classified as access land under the Countryside and Rights of Way Act 2000¹³. Such land may, however, be dedicated as access land by the owner¹⁴.

1 Until 1926 there was no public right of access to a common except in two classes of case (namely: (1) town or village greens; and (2) commons set aside by inclosure awards for recreation), and even then the right of access was strictly confined to the inhabitants of a particular locality (see the *Report of the Royal Commission on Common Land 1955-1958* (Cmnd 462) App III para 57). The Commission recommended that all common land should be open to the public as of right subject to the existing statutory restrictions (as to which see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 615 et seq): see the *Report of the Royal Commission on Common Land 1955-1958* (Cmnd 462) App III paras 314, 318.

2 These rights are exercisable both on foot and on horseback: see *R v Secretary of State for the Environment, ex p Billson* [1999] QB 374, [1998] 2 All ER 587 (disapproved without affecting this point in *R (on the application of Godmanchester Town Council) v Secretary of State for the Environment, Food and Rural Affairs, R (on the application of Drain) v Secretary of State for the Environment, Food and Rural Affairs* [2007] UKHL 28 at [42], [56]-[57], [2008] 1 AC 221 at [42], [56]-[57], [2007] 4 All ER 273 at [42], [56]-[57]).

3 For these purposes, 'land' includes land of any tenure, and mines and minerals, whether or not held apart from the surface, buildings or parts of buildings (whether the division is horizontal, vertical or made in any other way) and other corporeal hereditaments; also a manor, an advowson, and a rent and other incorporeal hereditaments, and an easement, right, privilege, or benefit in, over, or derived from land: see the Law of Property Act 1925 s 205(1)(ix) (amended by the Trusts of Land and Appointment of Trustees Act 1996 Sch 4). 'Mines and minerals' include any strata or seam of minerals or substances in or under any land, and powers of working and getting the same: Law of Property Act 1925 s 205(1)(ix) (as so amended). 'Manor' includes a lordship, and reputed manor or lordship; and 'hereditament' means any real property which on an intestacy occurring before 1 January 1926 (ie the commencement of the Law of Property Act 1925) might have devolved upon an heir: s 205(1)(ix).

4 Ie within the meaning of the Metropolitan Commons Acts 1866 to 1898: see **LONDON GOVERNMENT**.

5 'Manorial waste' is not defined. The difficulties as to whether the land needs to be currently attached to the lordship of the manor or if it is sufficient if the waste was part of the manor sometime in the past are now

resolved by *Hampshire County Council v Milburn* [1991] 1 AC 325, [1990] 2 All ER 257, HL ('waste land of a manor' means waste land now or formerly of a manor), applied in *Lewis v Mid Glamorgan County Council* [1995] 1 All ER 760, [1995] 1 WLR 313, HL.

6 See the Law of Property Act 1925 s 193(1) (amended by the Local Government Act 1972 s 189(4)). As to the meaning of 'common' at common law see PARA 406. Commons or manorial wastes which are for the time being held for naval, military or air force purposes and in respect of which rights of common have been extinguished or cannot be exercised are excepted: Law of Property Act 1925 s 193(6). Nothing in s 193 prejudices or affects the right of any person to get and remove mines or minerals or to let down the surface of the manorial waste or common: s 193(5).

The lord of the manor, or other person entitled to the soil of land subject to rights of common, may by deed, revocable or irrevocable, declare that any land which was subject to rights of common on 1 January 1926 is also to be subject to such rights of access, and such land is so subject for so long as the deed remains operative: see s 193(2) (repealed in relation to Wales, and prospectively repealed in relation to England as from a day to be appointed under the Countryside and Rights of Way Act 2000 s 103(3), by the Countryside and Rights of Way Act 2000 Sch 16 Pt I).

The registration provisions of the Commons Registration Act 1965 (see PARA 506 et seq) do not affect the application to any land registered under that Act of the Law of Property Act 1925 s 193: see the Commons Registration Act 1965 s 21(1) (prospectively repealed by the Commons Act 2006 Sch 6 Pt 1, as from a day to be appointed under s 56(1)); that repeal does not affect the application of the Law of Property Act 1925 s 193 in relation to any land (Commons Act 2006 Sch 3 para 7 (not fully in force)). At the date at which this volume states the law, Sch 3 para 7 was in force only in relation to the pilot areas in England. As to the pilot areas in England see PARA 467 text and notes 29-30. If the land has not been registered as common land the position is unclear: see *R v Doncaster Metropolitan Borough Council, ex p Braim* (1986) 85 LGR 233 at 241, 57 P & CR 1 at 8, where McCullough J suggested (obiter) that rights of public access would be extinguished.

7 Law of Property Act 1925 s 193(1)(a).

8 Law of Property Act 1925 s 193(1)(a).

9 Is imposed by the Secretary of State or the Welsh Ministers on the application of any person entitled as lord of the manor or otherwise to the soil of the land, or entitled to any commonable rights affecting the land: Law of Property Act 1925 s 193(1)(b). As to the Secretary of State, and the transfer of functions in relation to Wales to the Welsh Ministers, see PARA 423. Where any limitations or conditions are imposed, they must be published by such person and in such manner as the Secretary of State or the Welsh Ministers may direct: s 193(3). Any person who fails to observe any limitation or condition so imposed in respect of any such land is liable on summary conviction to a fine not exceeding level 1 on the standard scale for each offence: s 193(4) (amended by virtue of the Criminal Justice Act 1982 ss 38, 46). As to the standard scale see PARA 421 note 3.

10 The limitations and conditions which may be imposed are such limitations on and conditions as to the exercise of the rights of access or as to the extent of the land to be affected as, in the opinion of the Secretary of State or the Welsh Ministers, are necessary or desirable for preventing any estate, right or interest of a profitable or beneficial nature in, over, or affecting the land from being injuriously affected, for conserving flora, fauna or geological or physiographical features of the land, or for protecting any object of historical interest; and, where any such limitations or conditions are so imposed, the rights of access are subject to them: Law of Property Act 1925 s 193(1)(b) (amended by the Countryside and Rights of Way Act 2000 Sch 4 para 1).

11 Law of Property Act 1925 s 193(1)(c). As to the contravention of these provisions see further PARA 582 (use of vehicles) and PARA 585 (camping and lighting of fires).

12 Law of Property Act 1925 s 193(1)(d). This is so where the commonable rights are extinguished under any statutory provision (s 193(1)(d)(i)) or where a county, county borough or district council by resolution assents to its exclusion from the operation of s 193 and the resolution is approved by the Secretary of State or the Welsh Ministers (s 193(1)(d)(ii) (amended by the Local Government Act 1972 Sch 30; and the Local Government Act 1985 Sch 8 para 10(5); and the Local Government (Wales) Act 1994 Sch 16 para 7(1)). As to areas and authorities in England and Wales see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq. As to the extinguishment of commonable rights see PARA 493 et seq.

13 See the Countryside and Rights of Way Act 2000 s 15(1)(a). As to the meaning of 'access land' see PARA 580 note 7.

14 See the Countryside and Rights of Way Act 2000 s 16; and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 580.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/5. PUBLIC RIGHTS OF ACCESS OVER COMMONS/(1) RIGHTS OF ACCESS/582. Vehicular access.

582. Vehicular access.

Any person who, without lawful authority¹, draws or drives any carriage, cart, caravan, truck, or other vehicle upon any land² which is a metropolitan common³, a manorial waste⁴, or a common⁵, commits an offence⁶. It is, however, possible to acquire an easement⁷ to drive across such land by prescription⁸ or by virtue of the doctrine of lost modern grant⁹, notwithstanding that the long user required to be shown in order to establish such a right was by its nature illegal¹⁰.

It is also an offence¹¹ to drive¹² a mechanically propelled vehicle¹³ onto or upon any common land, or town or village green¹⁴, not being land forming part of a road¹⁵, or on any road being a footpath, bridleway or restricted byway¹⁶, without lawful authority¹⁷, except where the vehicle is driven onto land within 15 yards of a road, being a road on which a motor vehicle may lawfully be driven, for the purpose only of parking the vehicle on that land¹⁸. It is not, however, such an offence for a person with an interest in land, or a visitor to any land, to drive a mechanically propelled vehicle on a road if, immediately before 2 May 2006 in relation to England, or 11 May 2006 in relation to Wales¹⁹, the road was:

- 396 (1) shown in a definitive map and statement²⁰ as a road used as a public path; and
- 397 (2) in use for obtaining access to the land by the driving of mechanically propelled vehicles by a person with an interest in the land or by visitors to the land²¹.

1 The owner of land to which the Law of Property Act 1925 s 193(4) applies (see the text and notes 2-6), may authorise the doing of an act that if done without that authority would be an offence: see *Bakewell Management Ltd v Brandwood* [2004] UKHL 14, [2004] 2 AC 519, [2004] 2 All ER 305.

2 As to the meaning of 'land' for these purposes see PARA 581 note 3; and as to the land to which this offence applies see further PARA 581.

3 ie within the meaning of the Metropolitan Commons Acts 1866 to 1898: see **LONDON GOVERNMENT**.

4 'Manorial waste' is not defined: see further PARA 581 note 5.

5 As to the meaning of 'common' at common law see PARA 406; and as to the commons and manorial wastes to which this offence applies see further PARA 581 note 6.

6 Law of Property Act 1925 s 193(4). Any person who commits this offence is liable on summary conviction to a fine not exceeding level 1 on the standard scale for each offence: s 193(4) (amended by virtue of the Criminal Justice Act 1982 ss 38, 46). As to the standard scale see PARA 421 note 3.

7 As to the nature and characteristics of easements see **EASEMENTS AND PROFITS A PRENDRE** vol 16(2) (Reissue) PARA 1 et seq.

8 As to the acquisition of easements by prescription see **EASEMENTS AND PROFITS A PRENDRE** vol 16(2) (Reissue) PARA 74 et seq.

9 As to the doctrine of lost modern grant see **EASEMENTS AND PROFITS A PRENDRE** vol 16(2) (Reissue) PARA 91 et seq.

10 *Bakewell Management Ltd v Brandwood* [2004] UKHL 14, [2004] 2 AC 519, [2004] 2 All ER 305, overruling *Hanning v Top Deck Travel Group Ltd* (1993) 68 P & CR 14. As a result of the judgment in *Bakewell Management Ltd v Brandwood* [2004] UKHL 14, [2004] 2 AC 519, [2004] 2 All ER 305, the Countryside and Rights of Way Act 2000 s 68, which provided for statutory easements creating rights of vehicular access over

common land and town or village greens, became redundant and that provision was repealed by the Commons Act 2006 s 51 and by Sch 6 Pt 5. The Vehicular Access Across Common and Other Land (England) Regulations 2002, SI 2002/1711, lapsed on that repeal.

11 The offence created by the Road Traffic Act 1988 s 34 is a fixed penalty offence for the purposes of the Road Traffic Offenders Act 1988 Pt III (ss 51-90): see s 51(1), Sch 3 (Sch 3 amended for these purposes by the Countryside and Rights of Way Act 2000 Sch 7 para 9). As to the mode of prosecution, punishment etc for the offence see the Road Traffic Offenders Act 1988 s 9, Sch 2 Pt I (Sch 2 Pt I amended for these purposes by the Countryside and Rights of Way Act 2000 Sch 7 para 8); and **ROAD TRAFFIC** vol 40(2) (2007 Reissue) PARA 1034.

12 Where a separate person acts as a steersman of a motor vehicle, 'driver' includes that person as well as any other person engaged in the driving of the vehicle; and 'drive' is to be interpreted accordingly: Road Traffic Act 1988 s 192(1). 'Motor vehicle' does not include the vehicles excepted from the definition of 'mechanically propelled vehicle' (see note 13): s 189(1).

13 For these purposes 'mechanically propelled vehicle' does not include: (1) a mechanically propelled vehicle being an implement for cutting grass which is controlled by a pedestrian and is not capable of being used or adapted for any other purpose; (2) any other mechanically propelled vehicle controlled by a pedestrian which may be specified by regulations made for the purposes of the Road Traffic Act 1988 s 189 and the Road Traffic Regulation Act 1984 s 140 (see **ROAD TRAFFIC** vol 40(1) (2007 Reissue) PARA 210); or (3) an electrically assisted pedal cycle of such a class as may be prescribed by regulations so made: Road Traffic Act 1988 ss 34(7), 189(1) (s 34 substituted by the Countryside and Rights of Way Act 2000 Sch 7 para 5). 'Controlled by a pedestrian' means that the vehicle either is constructed or adapted for use only under such control, or is constructed or adapted for use either under such control or under the control of a person carried on it, but is not for the time being in use under, or proceeding under, the control of a person carried on it: Road Traffic Act 1988 s 189(2).

14 The offence created by the Road Traffic Act 1988 s 34 extends to driving on 'common land ... or land of any other description', which for these purposes includes town or village greens: see *Massey v Boulden* [2002] EWCA Civ 1634, [2003] 2 All ER 87, [2003] 1 WLR 1792 (disapproved, in so far as deciding that user in breach of the Road Traffic Act 1988 s 34(1) was a bar to the acquisition of an easement by prescription, in *Bakewell Management Ltd v Brandwood* [2004] UKHL 14, [2004] 2 AC 519, [2004] 2 All ER 305). As to town and village greens (over which rights of common may be exercisable) see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 532 et seq. For a fuller consideration of the offence created by the Road Traffic Act 1988 s 34, which is here dealt with only in so far as affecting common land, see **ROAD TRAFFIC** vol 40(2) (2007 Reissue) PARA 1007.

15 'Road' means any highway and any other road to which the public has access, and includes bridges over which a road passes: Road Traffic Act 1988 s 192(1) (amended by the Road Traffic Act 1991 s 48, Sch 4 para 78(1), (2)). See also note 14.

16 'Footpath' means a way over which the public have a right of way on foot only: Road Traffic Act 1988 s 192(1). 'Bridleway' means a way over which the public have the following, but no other, rights of way: a right of way on foot and a right of way on horseback or leading a horse, with or without a right to drive animals of any description along the way: s 192(1). 'Restricted byway' means a way over which the public has restricted byway rights within the meaning of the Countryside and Rights of Way Act 2000 Pt II (ss 47-72) (see **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 603), with or without a right to drive animals of any description along the way, but no other rights of way: Road Traffic Act 1988 s 34(7) (as substituted: see note 13).

A way shown in a definitive map and statement as a footpath, bridleway or restricted byway is, without prejudice to the Wildlife and Countryside Act 1981 s 56(1) (see **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 592), to be taken to be a way of the kind shown, unless the contrary is proved: Road Traffic Act 1988 s 34(2) (as so substituted; amended by the Natural Environment and Rural Communities Act 2006 s 70(2), (3), Sch 12). As to the meaning of 'definitive map and statement' see, by virtue of the Road Traffic Act 1988 s 34(7) (as so substituted), the Wildlife and Countryside Act 1981 s 53(1); and **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 591.

As from a day to be appointed, however, this is subject to the proviso that, where a person is charged with an offence under the Road Traffic Act 1988 s 34 in respect of the driving of any vehicle, it is open to that person to prove under s 34(2) that a way shown in a definitive map and statement as a footpath, bridleway or restricted byway is not a way of the kind shown only: (1) if he proves to the satisfaction of the court (a) that he was a person interested in any land and that the driving of the vehicle by him was reasonably necessary to obtain access to the land; (b) that the driving of the vehicle by him was reasonably necessary to obtain access to any land, and was for the purpose of obtaining access to the land as a lawful visitor; or (c) that the driving of the vehicle by him was reasonably necessary for the purposes of any business, trade or profession; or (2) in such circumstances as may be prescribed by regulations (and head (1) is without prejudice to this provision): s 34A(1) (s 34A prospectively added by the Countryside and Rights of Way Act 2000 Sch 7 para 6, as from a day to be appointed under s 103(3); at the date at which this volume states the law no such day had been appointed). For these purposes, 'interest', in relation to land, includes any estate in land and any right over land, whether the right is exercisable by virtue of the ownership of an estate or interest in land or by virtue of a

licence or agreement, and in particular includes rights of common and sporting rights, and the reference to a person interested in land is to be construed accordingly; and 'lawful visitor', in relation to land, includes any person who enters the land for any purpose in the exercise of a right conferred by law: Road Traffic Act 1988 s 34A(2) (as so added).

17 Road Traffic Act 1988 s 34(1), (5)(a) (as substituted: see note 13). As to what constitutes 'lawful authority' cf note 1; and the text and notes 7-10. A person cannot be convicted of an offence under s 34(1) with respect to a vehicle if he proves to the satisfaction of the court that it was driven in contravention of s 34(1) for the purpose of saving life or extinguishing fire or meeting any other like emergency: s 34(4) (as so substituted).

The offence created by s 34 does not prejudice the operation of any byelaws applying to any land (s 34(5)(b) (as so substituted)) and does not affect the law of trespass to land or any right or remedy to which a person may by law be entitled in respect of any such trespass (s 34(5) (as so substituted)). See also note 18. As to trespass generally see **TORT**.

18 Road Traffic Act 1988 s 34(3) (as substituted: see note 13). Note, however, that these provisions do not confer a right to park a vehicle on any land: s 34(5) (as so substituted). See also note 17.

19 Re the commencement date of the Countryside and Rights of Way Act 2000 s 47(2): see the Countryside and Rights of Way Act 2000 (Commencement No 11 and Savings) Order 2006, SI 2006/1172, art 2(a); the Countryside and Rights of Way Act 2000 (Commencement No 8 and Transitional Provisions) (Wales) Order 2006, SI 2006/1279, art 2(a).

20 See note 16.

21 Road Traffic Act 1988 s 34(2A) (added by the Natural Environment and Rural Communities Act 2006 s 70(2), (4)).

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/5. PUBLIC RIGHTS OF ACCESS OVER COMMONS/(1) RIGHTS OF ACCESS/583. Power to prohibit caravans on commons.

583. Power to prohibit caravans on commons.

A district council in England, a county or county borough council in Wales¹, a National Park authority² and the Broads Authority³ may make orders with respect to any land in its area which is or forms part of a common⁴ prohibiting the stationing of caravans⁵ on the land for the purposes of human habitation⁶. Before making the order, the council or authority must consult with the conservators of the common, if any⁷, and must publish a notice in one or more of the local newspapers stating the general effect of the order, specifying a place in the locality where a copy of the order may be inspected free of charge at all reasonable hours within the succeeding 28 days and stating that any person may object within that time⁸. Not later than the date of publication of the notice, the council or authority must serve a copy on every person entitled as lord of the manor or otherwise to the soil of the land, unless it is satisfied that the persons entitled to the soil of the land are numerous or cannot be ascertained after diligent inquiry⁹. If any person entitled to the soil of the land objects to the making of the order within the period of 28 days allowed, the council or authority must not proceed with the order¹⁰, but, if no such objection is received, the council or authority may make the order within one year of the expiration of that period¹¹.

An order may at any time be revoked by a subsequent order, or varied so as to exclude land from its operation or so as to introduce an exemption, or further exemption, from the prohibition imposed¹². Where the whole or part of any land subject to an order ceases to be, or to form part of, a common, the order no longer has effect with respect to that land or part¹³.

Any person who stations a caravan on any land in contravention of any such order is guilty of an offence and liable on summary conviction to a fine not exceeding level 1 on the standard scale¹⁴.

1 The Caravan Sites and Control of Development Act 1960 s 23 refers to 'the council of a district', but in practice this is a reference to a district council in England and a county or county borough council in Wales: see s 23(9) (added by the Local Government (Wales) Act 1994 Sch 16 para 16(1)). As to areas and authorities in England and Wales see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq.

2 A National Park authority is empowered to make orders under the Caravan Sites and Control of Development Act 1960 s 23, Sch 2 in respect of any registered common within the national park or for which the authority is the local authority, provided the common in question is not owned by, or vested in, any other body which is a local authority: see the Environment Act 1995 s 70, Sch 9 para 1(1), (2)(c), (5). For these purposes, 'registered common' means any land registered as common land or as a town or village green (1) at the date at which this volume states the law, under the Commons Registration Act 1965; or (2) as from a day to be appointed, under the Commons Act 2006 Pt 1 (ss 1-25) (not fully in force): Environment Act 1995 Sch 9 para 1(6) (prospectively amended, so as to substitute for the words set out in head (1) above the words set out in head (2) above, by the Commons Act 2006 Sch 5 para 6(b), as from a day to be appointed under s 56(1); at the date at which this volume states the law, no such day had been appointed). As to the meaning of 'common land' for registration purposes see PARA 407; and as to town and village greens see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 532 et seq. As to National Parks and National Park authorities see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 636 et seq; **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 526 et seq.

3 By the Norfolk and Suffolk Broads Act 1988 s 2(6), Sch 3 Pt II para 38(1)(c), (2), in relation to any registered common within the Broads (as defined by s 2(3)) which is not owned by, or vested in, a local authority and which is not a staithe, the Broads Authority is to be treated as the local authority for these purposes and, in relation to any staithe which is within the Broads and registered as a common, a local authority is to exercise its functions jointly with the Broads Authority or with the consent of that Authority. As to the Broads Authority see **WATER AND WATERWAYS** vol 101 (2009) PARA 734; and as to the meaning of 'staithe' see PARA 427 note 3.

4 For these purposes, 'common' includes any land subject to be inclosed under the Inclosure Acts 1845 to 1882, and any town or village green: Caravan Sites and Control of Development Act 1960 s 23(8). As to the Inclosure Acts see PARA 419 note 2; and as to inclosure generally see PARA 418 et seq. The power to make orders does not, however, extend to land to which the Law of Property Act 1925 s 193 (which relates to the rights of the public over certain commons and waste lands: see PARA 581) for the time being applies, land which is subject to a scheme under the Commons Act 1899 Pt I (ss 1-15) (under which schemes may be made for the regulation and management of certain commons: see PARAS 427, 590-598), or land as respects which a site licence (ie a licence under the Caravan Sites and Control of Development Act 1960 Pt I (ss 1-30) authorising the use of land as a caravan site: see **TOWN AND COUNTRY PLANNING** vol 46(3) (Reissue) PARA 1032) is for the time being in force: s 23(1) (s 23(1), (4), (5), (6) amended by the Local Government Act 1972 Sch 29 para 14).

5 As to the meaning of 'caravan' see PARA 428 note 5.

6 Caravan Sites and Control of Development Act 1960 s 23(2) (amended by SI 1975/1636). The function of making such an order is a 'relevant function' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 Pt 1 (ss 1-21) (see s 4, Sch 3; and **LOCAL GOVERNMENT** vol 69 (2009) PARA 733); thus the Local Better Regulation Office may give guidance to local authorities as to the exercise of that function (see s 7; and **LOCAL GOVERNMENT** vol 69 (2009) PARA 734).

7 Caravan Sites and Control of Development Act 1960 Sch 2 para 1 (Sch 2 amended by the Local Government Act 1972 Sch 30).

8 Caravan Sites and Control of Development Act 1960 Sch 2 para 2 (as amended: see note 7). The requirements as to the publication of notice and receiving of objections do not apply where the sole effect of the order is to revoke or vary a previous order: Caravan Sites and Control of Development Act 1960 Sch 2 para 2 (as so amended).

9 Caravan Sites and Control of Development Act 1960 Sch 2 para 3(1) (as amended (see note 7); also amended by the Local Government Act 1974 Sch 6 para 13, Sch 8). For this purpose, a notice may be served on any person by sending it in a registered or recorded delivery letter addressed to him at his usual or last known address: Caravan Sites and Control of Development Act 1960 Sch 2 para 3(2). The council or authority must take all reasonable steps to secure that copies of any such order for the time being in force are so displayed on the land affected as to give adequate warning of the existence of the order, and may place notices on the land to that effect: s 23(4) (as amended: see note 4). The requirements as to the issuing of notices to interested persons are modified in respect of land in which there is a Crown or Duchy interest, that is, an interest belonging to Her Majesty in right of the Crown or of the Duchy of Lancaster, or belonging to the Duchy of Cornwall or to a government department (see Sch 2 para 6); in such a case, notice of the order must be served on the government department concerned or other appropriate authority (see Sch 2 para 6(1)(a), (2)), and the council must not make the order until it has obtained the consent in writing of that authority (Sch 2 para 6(1) (b)).

10 Caravan Sites and Control of Development Act 1960 Sch 2 para 4(1) (as amended: see note 7).

11 Caravan Sites and Control of Development Act 1960 Sch 2 para 4(2). If the objection was made within the 28 day period by a person who was not entitled to the soil of the land, and it has not been withdrawn at the date of the order, the order must be confirmed by the Secretary of State or the Welsh Ministers: Sch 2 para 4(2). The Secretary of State or the Welsh Ministers, after considering every objection and causing if, he thinks or they think fit, a local inquiry to be held, may confirm the order with or without modifications, or refuse to confirm it: Sch 2 para 4(3). As to the Secretary of State, and the transfer of functions in relation to Wales to the Welsh Ministers, see PARA 423.

12 Caravan Sites and Control of Development Act 1960 s 23(5) (as amended: see note 4). Where the sole effect of an order is to revoke or vary a previous order, the requirements as to the making of an order contained in Sch 2 paras 2-4 (see the text and notes 8-11) do not apply, but the council or authority must serve such notices and take such other steps as appear to it appropriate for informing the persons entitled to the soil of the land of the effect of the order: Sch 2 para 5 (as amended: see note 7).

13 Caravan Sites and Control of Development Act 1960 s 23(6) (as amended: see note 4). Where an order ceases to have effect with respect to a part of the land, any copies of the order displayed on the remaining land must be amended accordingly: s 23(6) (as so amended).

14 Caravan Sites and Control of Development Act 1960 s 23(3) (amended by virtue of the Criminal Justice Act 1982 ss 38, 46). As to the standard scale see PARA 421 note 3. This is without prejudice to the provisions of the Caravan Sites and Control of Development Act 1960 s 1 (see **TOWN AND COUNTRY PLANNING** vol 46(3) (Reissue) PARA 1032) under which a site licence may be required: s 23(3).

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/5. PUBLIC RIGHTS OF ACCESS OVER COMMONS/(2) DUTIES OF PERSONS ACCESSING COMMON LAND/584. Powers to regulate the exercise of rights of access.

(2) DUTIES OF PERSONS ACCESSING COMMON LAND

584. Powers to regulate the exercise of rights of access.

Natural England¹ and the Countryside Council for Wales² have a duty to issue codes of conduct for the guidance of persons exercising rights of access under Part I of the Countryside and Rights of Way Act 2000³ to common land⁴ and other land which is access land⁵ for the purposes of that Act⁶. They may also make byelaws for the protection of a site of special scientific interest⁷. An access authority⁸ may, as respects access land in its area, make byelaws:

- 398 (1) for the preservation of order;
- 399 (2) for the prevention of damage to the land or anything on or in it; and
- 400 (3) for securing that persons exercising the right of access⁹ so behave themselves as to avoid undue interference with the enjoyment of the land by other persons¹⁰.

All these powers are discussed in more detail elsewhere in this work¹¹.

1 As to Natural England see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 523.

2 As to the Countryside Council for Wales see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 524.

3 Ie under the Countryside and Rights of Way Act 2000 Pt 1 (ss 1-46): see PARA 580; and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 636 et seq; **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 578 et seq.

4 As to the common land which is access land see PARA 580 note 7.

5 As to meaning of 'access land' see PARA 580 note 7.

6 See the Countryside and Rights of Way Act 2000 s 20 (amended by the Natural Environment and Rural Communities Act 2006 Sch 11 Pt 1 para 156(1), (2)); and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 593.

7 See the Wildlife and Countryside Act 1981 s 28R (added by the Countryside and Rights of Way Act 2000 Sch 9 para 1; amended by the Natural Environment and Rural Communities Act 2006 Sch 11 Pt 1 para 79); and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 694. As to the exercise of this power by the Countryside Council for Wales see the Wildlife and Countryside Act 1981 s 27AA (added by the Natural Environment and Rural Communities Act 2006 Sch 11 Pt 1 para 78); and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 674 et seq. As to management schemes for sites of special scientific interest see PARA 610.

8 For these purposes, 'access authority' means (1) in relation to land in a National Park, the National Park authority; and (2) in relation to any other land, the local highway authority in whose area the land is situated: Countryside and Rights of Way Act 2000 s 1(2). For these purposes, the Broads are to be treated as a National Park and the Broads Authority as a National Park authority: s 45(3). As to National Parks and National Park authorities see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 636 et seq; **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 526 et seq; and as to the Broads Authority see **WATER AND WATERWAYS** vol 101 (2009) PARA 734.

9 Ie the right conferred by the Countryside and Rights of Way Act 2000 s 2(1): see PARA 580; and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 583.

10 Countryside and Rights of Way Act 2000 s 17(1). See further s 17(2)-(8); and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 591.

11 See **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 501 et seq.

UPDATE

584 Powers to regulate the exercise of rights of access

NOTE 6--Countryside and Rights of Way Act 2000 s 20 further amended: Marine and Coastal Access Act 2009 s 303(7).

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/5. PUBLIC RIGHTS OF ACCESS OVER COMMONS/(2) DUTIES OF PERSONS ACCESSING COMMON LAND/585. Offences on common land.

585. Offences on common land.

Any person who, without lawful authority, camps or lights any fire upon any land¹ which is a metropolitan common², a manorial waste³, or a common⁴, commits an offence⁵. Unauthorised camping, and the failure to desist therefrom when ordered so to do, is an offence under public order legislation⁶, as are trespassing on land for the purpose of intimidating persons engaging in a lawful activity or of disrupting that activity⁷, and failing to leave such land when directed so to do by a senior police officer⁸.

Physical damage to property, including livestock, on common land is an offence under a variety of enactments⁹. It is also an offence: (1) to leave litter in any place in the open air to which the public has access¹⁰; (2) to abandon on any land in the open air, or on any other land forming part of a highway, a motor vehicle¹¹, or part of a motor vehicle, or any other thing which was brought to the land for the purpose of abandoning it there¹²; and (3) to park a heavy commercial vehicle¹³ wholly or partly on a roadside verge, on land situated between two carriageways or on a footway¹⁴.

1 As to the meaning of 'land' for these purposes see PARA 581 note 3.

2 ie within the meaning of the Metropolitan Commons Acts 1866 to 1898: see **LONDON GOVERNMENT**.

3 'Manorial waste' is not defined for these purposes: see further PARA 581 note 5.

4 As to the meaning of 'common' at common law see PARA 406. As to the commons and manorial wastes to which this offence applies see further PARA 581 note 6.

5 Law of Property Act 1925 s 193(4). Any person who commits this offence is liable on summary conviction to a fine not exceeding level 1 on the standard scale for each offence: s 193(4) (amended by virtue of the Criminal Justice Act 1982 ss 38, 46). As to the standard scale see PARA 421 note 3.

6 See the Criminal Justice and Public Order Act 1994 ss 77-79; and **TOWN AND COUNTRY PLANNING** vol 46(3) (Reissue) PARAS 1055-1057.

7 See the Criminal Justice and Public Order Act 1994 s 68; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) para 592.

8 See the Criminal Justice and Public Order Act 1994 s 69; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) para 592.

9 See eg the Dogs (Protection of Livestock) Act 1953 s 1 (penalty where dog worries livestock on agricultural land: see **ANIMALS** vol 2 (2008) PARA 924); the Criminal Damage Act 1971 s 1 (destruction of or damage to property belonging to another: see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 334); the Ancient Monuments and Archaeological Areas Act 1979 s 28 (damage to monuments: see **NATIONAL CULTURAL HERITAGE** vol 77 (2010) PARA 1042); and the Wildlife and Countryside Act 1981 Pt I (ss 1-27) (protection of wild animals and plants: see **AGRICULTURAL PRODUCTION AND MARKETING** vol 1 (2008) PARAS 1032-1033, 1049-1050; **ANIMALS** vol 2 (2008) PARA 994 et seq).

10 See the Environmental Protection Act 1990 s 87; and **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 46 (2010) PARA 721.

11 As to the meaning of 'motor vehicle' see the Refuse Disposal (Amenity) Act 1978 s 11(1); and **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 46 (2010) PARA 742.

12 See the Refuse Disposal (Amenity) Act 1978 s 2; and **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 46 (2010) PARA 742.

13 As to heavy commercial vehicles for these purposes see the Road Traffic Act 1988 s 20; and **ROAD TRAFFIC** vol 40(1) (2007 Reissue) PARA 220.

14 See the Road Traffic Act 1988 s 19; and **ROAD TRAFFIC** vol 40(2) (2007 Reissue) PARA 997.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/6. REGULATION OF COMMONS AND WORKS ON COMMONS/(1) REGULATION OF COMMONS UNDER THE COMMONS ACT 1876/586. Introduction.

6. REGULATION OF COMMONS AND WORKS ON COMMONS

(1) REGULATION OF COMMONS UNDER THE

586. Introduction.

The Inclosure Acts 1845 to 1882, and in particular the Commons Act 1876¹, contained provisions for applications to be made for the regulation of commons². These provisions are still material in so far as existing schemes are concerned and questions continue to arise on such schemes, but the procedure for regulation may be regarded as obsolete³. The preliminary steps towards a provisional order for the regulation of a common, with regard to advertisements and notices and the provision of information, were the same as had to be taken on an application for inclosure⁴. The Inclosure Commissioners⁵ could not, however, proceed on an application for a provisional order until it was made to appear to them that the persons making the application represented at least one-third in value of such interests in the common as were proposed to be affected by the order⁶.

A provisional order for the regulation of a common could provide, generally or otherwise, for the 'adjustment of rights'⁷ and 'improvement of the common'⁸, or for any of the things comprised under those two expressions, or could state that all or any of those subjects were to be provided for in the proceedings subsequent to the confirmation of the provisional order by Parliament⁹.

The Inclosure Commissioners, and their successors, could insert in any provisional order for the regulation of a common any provisions they deemed necessary for carrying the order into effect¹⁰. Subject to this, the proceedings for carrying into effect the regulation were the same, so far as practicable, as they would have been if the common were being inclosed instead of regulated, and the provisions of the Inclosure Acts were applied accordingly¹¹.

Where an Act was passed confirming a provisional order for the regulation of a common, then, subject and without prejudice to the provisions of the order, no part of the common could be inclosed without the subsequent sanction of Parliament¹². A plea that a claim was barred by lapse of time was held to be of no avail as to any encroachment made since the passing of the Act confirming the provisional order¹³.

If it appears to the appropriate national authority¹⁴ desirable to do so in consequence of functions conferred on a commons council¹⁵ in relation to any land¹⁶, that authority may by order¹⁷ vary or revoke any Act made under the Commons Act 1876¹⁸ confirming a provisional order of the Inclosure Commissioners or any arrangement arising under such an Act¹⁹; but it may not make such provision to the extent that to do so would have the effect of abolishing or restricting a right of access of whatever nature exercisable by members of the public generally or by any section of the public²⁰.

1 As to the Inclosure Acts see PARA 419 note 2. The principal Act here concerned is the Commons Act 1876. The Commons Act 1899, though by s 24 directed to be read with the Inclosure Acts 1845 and 1882, is here omitted, as the procedure for regulation under that Act is distinct: see PARAS 590-598. Furthermore, metropolitan commons may not be regulated under the Commons Act 1876: see s 35.

2 See the text and notes 4-13. As to the meaning of 'common' for the purposes of the Commons Act 1876 see PARA 419 note 19.

3 Only 36 applications for regulation under the Commons Act 1876 have been made, the last being in 1919: see the *Report of the Royal Commission on Common Land 1955-1958* (Cmnd 462) App III paras 43, 52.

4 See PARA 419.

5 As to the Inclosure Commissioners and their successors see PARA 423.

6 Commons Act 1876 s 2 (repealed). An application could formerly also be made by a local authority where at least one-third in value of such interests in the common consented to the application: s 8 (repealed). The consents of two-thirds in value of such interests and of the lord of the manor, where the lord was entitled to the soil in right of his manor, were required before the Inclosure Commissioners could certify the provisional order to be expedient: s 12(5) (repealed).

There is no provision in the Commons Act 1876, or its amending Acts, for the amendment or supplementation of a scheme of regulation once confirmed by Parliament, as there is in the case of a scheme of regulation made under the Commons Act 1899 (see the Commons Act 1899 s 9; and PARA 593). See, however, the Commons Act 2006 36(1), (2)(d); and the text and notes 14-20.

7 'Adjustment of rights' comprised all or any of: (1) as respects rights of common of pasture in a common being waste land of a manor, the determination of the persons by whom, the stock by which, and the times at which such common of pasture could be exercised; (2) as respects rights of common of turbary or taking of estovers, or taking of gravel or stone, or otherwise interfering with the soil of the common, being waste land of a manor, the determination of the persons by whom, and the mode and place or places in which, and the times at which, such rights were to be exercised (and also, on compensation made to any person aggrieved either by grant of a right of equal value or, with his consent in writing, in money, the restriction, modification or abolition of all or any such rights which may permanently injure the common); (3) as respects rights of common in land which is not waste land of a manor, the stinting or other determination of such rights, and the persons by whom, and the mode in which, and the times at which, such rights were to be exercised (with a similar provision for the restriction, modification or abolition of any such rights which were injurious to the general body of the commoners or the proper cultivation of the land); (4) as respects any common, whether or not waste land of a manor, the determination of the rights and obligations of the lord of the manor, severalty owners or other person or persons entitled to the soil of such common (with similar provision for the restriction, modification or abolition of all or any such rights, and in particular, in the case of severalty owners, of all or any such rights which may be injurious to the general body of the severalty owners, or to the proper cultivation of the land); and (5) generally as respects any common, whether or not waste land of a manor: the determination of any rights and settlement of any disputes relating to boundaries, rights in the soil or in the produce of the soil, or otherwise, whether arising between the commoners themselves or between the commoners in relation to the lords of the manors, severalty owners, or other person or persons entitled to the soil of the common, which settlement may be conducive to the interests of all or any class of persons interested in the common: Commons Act 1876 s 4 (repealed). 'Waste land of a manor' means and includes any land consisting of: (a) waste land of any manor on which the tenants of such manor have rights of common; (b) any land subject to any rights of common which may be exercised at all times of the year for cattle levant and couchant; or (c) any land subject to any rights of common which may be exercised at all times of the year and are not limited by number or stints: Commons Act 1876 s 37. As to levancy and couchancy (which are now irrelevant as the numbers of animals were to be quantified on registration) see PARA 433 note 2. As to rights of common of pasture see PARA 433 et seq; as to common of turbary see PARAS 457-458; and as to common of estovers see PARAS 459-460. The raising of the money was provided for by the Commons Act 1876 s 18 (repealed), which provided that, subject to the terms of the provisional order, the amount of any such compensation would be deemed to be expenses of and incidental to the regulation of the common, and could be defrayed accordingly: see PARA 588.

8 'Improvement of a common' comprised all or any of: (1) the draining, manuring or levelling of the common; (2) the planting of trees on parts of such common, or in any other way improving or adding to the beauty of the common; (3) the making or causing to be made byelaws and regulations for the prevention of or protection from nuisances or for keeping order on the common; (4) the general management of the common; and (5) the appointment from time to time of conservators of the common for these purposes: Commons Act 1876 s 5 (repealed). The number of conservators and the persons or bodies by whom they were to be appointed was specified in the provisional order. Usually the lord of the manor stipulated for the right of appointing one or more, a certain number were elected by the commoners and the parish council, and, if the district council agreed to contribute to the expenses of management, it could also be given representation; where the common rights were of little or no value the management of the common could be, and sometimes was, vested in the council. As to areas and authorities in England and Wales see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq. The power to appoint conservators with powers of management and preventing encroachments, of making byelaws for the protection of and prevention of nuisances on the common, and of obtaining convictions for offences against the byelaws by summary proceedings before justices, provided for the constitution of a responsible body with definite powers. As to the power of conservators to sue see *Collis v Amphlett* [1918] 1 Ch 232, CA; revsd on another point [1920] AC 271, HL. As to remedy by injunction see *Mitcham Common Conservators v Harvey* (1910) 74 JP Jo 137. In *R v Dyer* (1952) 36 Cr App Rep 155, the Court of Criminal Appeal held that the powers conferred on a parish council (to whom the rural district council had delegated its powers

as conservators) by the Commons Act 1899 s 1(1) (see PARA 590), did not entitle it to authorise the erection of an advertisement board by a firm of builders, and the commoners were within their rights in pulling it down.

Conservators could make byelaws only in so far as they were authorised so to do by the scheme of regulation, and the byelaws had to be reasonable. Conservators frequently made byelaws for regulating the use of a common, or part of a common, for the purpose of playing games and recreation, and byelaws for this purpose could give preferential treatment to persons or classes of persons. Byelaws have been held to be valid in the following cases: *De Morgan v Metropolitan Board of Works* (1880) 5 QBD 155 (byelaw prohibiting the delivery of public speeches or addresses without written permission); *Nash v Manning* (1894) 58 JP 718 (byelaw prohibiting the placing of a boat-van for pleasure on a common without licence and without payment of the prescribed fee held to be not ultra vires merely because it was not confined to such vans as were nuisances); *Mitcham Common Conservators v Cox, Mitcham Common Conservators v Cole* [1911] 2 KB 854, DC (byelaw prohibiting persons playing golf on golf course unless accompanied by a caddie licensed by the conservators or the golf club); *Harris v Harrison* (1914) 111 LT 534 (byelaw prohibiting a non-member of a golf club from playing golf before certain times on certain days). As to giving preference to persons for playing games see *Mitcham Common Conservators v Cox, Mitcham Common Conservators v Cole* [1911] 2 KB 854, DC and *Harris v Harrison* (1914) 111 LT 534. Where an Act gave persons who had certain qualifications the right to vote at the election of conservators, a byelaw providing that no person, not being an elector named and prescribed in the list of voters, should vote, was held to be invalid in so far as it diminished the right of those persons to vote: *Purves v Wimbledon and Putney Commons Conservators* (1890) 62 LT 529.

Where a provisional order provided for the improvement of a common only and not for the adjustment of rights, the valuer had no jurisdiction to settle by his award any question of title or boundaries: the award map was not conclusive, and if any question as to boundaries arose, it was open to the court to determine the true boundaries: *Collis v Amphlett* [1918] 1 Ch 232, CA; revsd on another point [1920] AC 271, HL.

As to the improvement of livestock rearing land subject to rights of common see the Hill Farming Act 1946 s 12; and **AGRICULTURAL PRODUCTION AND MARKETING** vol 1 (2008) PARA 1336.

9 Commons Act 1876 s 3 (repealed).

10 Commons Act 1876 s 13 (repealed).

11 See note 10.

12 Commons Act 1876 s 36 (repealed by the Commons Act 2006 Sch 6 Pt 2; at the date at which this volume states the law, that repeal was not in force in relation to Wales).

13 *Collis v Amphlett* [1918] 1 Ch 232, CA; revsd on another point [1920] AC 271, HL.

14 As to the meaning of 'appropriate national authority' see PARA 411 note 1.

15 As to the establishment of commons councils see PARAS 601-603; and as to their functions see PARA 604 et seq.

16 As to the meaning of 'land' see PARA 403 note 1.

17 Ie an order under the Commons Act 2006 s 26: see PARA 601.

18 See note 1.

19 See the Commons Act 2006 s 36(1), (2)(d); and PARA 601 note 8.

20 Commons Act 2006 s 36(3).

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/6. REGULATION OF COMMONS AND WORKS ON COMMONS/(1) REGULATION OF COMMONS UNDER THE COMMONS ACT 1876/587. Prohibition on getting of road materials from regulated commons.

587. Prohibition on getting of road materials from regulated commons.

When a common¹ is regulated by a provisional order duly confirmed², no highway authority³ has power to search for or get gravel, sand, stone or other materials for road repairs from any part of the common which has not been set apart for that purpose with the sanction of Parliament, without the consent of the persons or body who have the regulation or management of the common, or, in default of such consent, without an order of two or more justices of the peace, who may in their order prescribe conditions as to the mode of working and the restitution of the surface as they deem expedient⁴.

1 As to the meaning of 'common' for these purposes see PARA 419 note 19.

2 The Commons Act 1876 provided for the regulation of a common: see PARA 586. As to provisional orders see PARA 586.

3 As to the highway authorities see **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 49 et seq.

4 Commons Act 1876 s 20 (amended by the Statute Law Revision Act 1894; the Statute Law (Repeals) Act 1998; and the Courts Act 2003 Sch 8 para 54). Under the Commons Act 1876 s 20 the justices have an absolute discretion as to making or refusing to make an order: *Hayes Common Conservators v Bromley RDC* [1897] 1 QB 321, DC. The provision of an allotment for the supply of materials for the repair of the roads in the parish was usual in inclosures, and is not uncommon in cases of regulation. As to the use of the terms 'inclose', 'inclosure' etc see PARA 418 note 2; and as to inclosure generally see PARA 418 et seq.

Any common or commonable land the soil of which is vested in the National Trust is deemed to be a common to which the provisions of the Commons Act 1876 s 20 apply: National Trust Act 1907 s 36.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/6. REGULATION OF COMMONS AND WORKS ON COMMONS/(1) REGULATION OF COMMONS UNDER THE COMMONS ACT 1876/588. Expenses of regulation and improvement.

588. Expenses of regulation and improvement.

The expenses of and incidental to the regulation of a common¹ could, if the Inclosure Commissioners² thought fit, be provided for by the insertion in the provisional order³ of a clause authorising the raising and payment of such expenses by a sale of a portion of the common, in which case the situation and maximum quantity of the portion to be sold was to be specified in the provisional order⁴. The expenses would then be raised and paid as in a case of inclosure⁵.

The provisional order could also provide for the raising of money from time to time by such persons interested in the common, and for such amounts, as the commissioners thought fit, to be applied towards the improvement or protection of the common⁶ either:

- 401 (1) by means of rates to be levied on the persons and in respect of the property who and which would be benefited or principally benefited by such improvement or regulation; or
- 402 (2) by means of the sale of any outlying or small portion of the common not exceeding in the whole one-fortieth of the total area⁷.

1 As to the meaning of 'common' for these purposes see PARA 419 note 19. The Commons Act 1876 provided for the regulation of a common: see PARA 586.

2 As to the Inclosure Commissioners and their successors see PARA 423.

3 As to provisional orders see PARA 586.

4 Commons (Expenses) Act 1878 s 2.

5 See the Commons (Expenses) Act 1878 s 2. As to the use of the terms 'inclose', 'inclosure' etc see PARA 418 note 2; and as to inclosure generally see PARA 418 et seq.

6 See PARA 586 note 8.

7 Commons Act 1876 s 14 (repealed). In the case of such a sale as is described in head (2) in the text, the situation and maximum quantity had to be specified in the provisional order, and the proceeds of sale could be invested and the income used, with power to resort to the capital from time to time if a provision to that effect was inserted in the order: Commons (Expenses) Act 1878 s 3 (repealed).

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/6. REGULATION OF COMMONS AND WORKS ON COMMONS/(1) REGULATION OF COMMONS UNDER THE COMMONS ACT 1876/589. Exemption from registration under the Commons Registration Act 1965 but not under the Commons Act 2006.

589. Exemption from registration under the Commons Registration Act 1965 but not under the Commons Act 2006.

The Secretary of State¹ might by order exempt from the requirement of registration under the Commons Registration Act 1965² any land regulated by a scheme under the Commons Act 1876³, provided that no rights of common had been exercised over it for at least 30 years and that the owner of the land was known⁴. Land exempted by such an order is not, however, excluded from the operation of Part 1 of the Commons Act 2006⁵ and may qualify for registration under the provisions of that Act allowing for the registration of common land not previously registered⁶.

Where land regulated by such a scheme has not been registered as common land, the carrying out of certain works on it without the consent of the appropriate national authority⁷ is nevertheless restricted by the Commons Act 2006⁸.

1 As to the Secretary of State see PARA 423. Functions under the Commons Registration Act 1965 were transferred, in relation to Wales, to the National Assembly for Wales in 1999 and are now exercisable by the Welsh Ministers (see PARA 423) but the functions described in the text were no longer capable of being exercised at the date of that transfer: see PARA 509 text and note 10.

2 As to the requirement of registration see PARA 403; and as to registration under the Commons Registration Act 1965 see PARA 506 et seq.

3 As to such regulation see PARA 586.

4 See the Commons Registration Act 1965 s 11(1)-(3); and PARA 509.

5 Ie the Commons Act 2006 Pt 1 (ss 1-25) (not fully in force).

6 See the Commons Act 2006 Sch 2 para 2 (not fully in force); and PARA 535.

7 As to the meaning of 'appropriate national authority' see PARA 411 note 1.

8 See the Commons Act 2006 Pt 3 (ss 38-44) (not fully in force in relation to Wales); and PARA 612 et seq.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/6. REGULATION OF COMMONS AND WORKS ON COMMONS/(2) REGULATION OF COMMONS UNDER THE COMMONS ACT 1899/590. Power of local authorities to make schemes.

(2) REGULATION OF COMMONS UNDER THE

590. Power of local authorities to make schemes.

Under the Commons Act 1899, district councils in England, county or county borough councils in Wales¹, National Park authorities² and the Broads Authority³ may make schemes for the regulation and management of commons⁴. A scheme must be in a form prescribed by regulations⁵, and must identify the common by means of a plan⁶.

If it appears to the appropriate national authority⁷ desirable to do so in consequence of functions conferred on a commons council⁸ in relation to any land⁹, that authority may by order¹⁰ vary or revoke any scheme made under the Commons Act 1899, or any arrangement arising under such a scheme¹¹; but it may not so make provision to the extent that to do so would have the effect of abolishing or restricting a right of access of whatever nature exercisable by members of the public generally or by any section of the public¹².

1 The Commons Act 1899 s 1(1) refers to 'the council of an urban district' but in practice this is a reference to a district council in England and a county or county borough council in Wales: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq.

2 A National Park authority is empowered to make schemes under the Commons Act 1899 s 1 in respect of any registered common within the National Park or for which the authority is the local authority, provided the common in question is not owned by, or vested in, any other body which is a local authority, and references in s 1 to the council by which a scheme is made are to be construed accordingly: see the Environment Act 1995 s 70, Sch 9 para 1(1), (2)(a), (3), (5). As to the meaning of 'registered common' for these purposes see PARA 583 note 2. As to National Parks and National Park authorities see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 636 et seq; **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 526 et seq.

3 By the Norfolk and Suffolk Broads Act 1988 s 2(6), Sch 3 Pt II para 38, in relation to any registered common within the Broads (as defined by s 2(3)) which is not owned by, or vested in, a local authority and which is not a staithe, the Broads Authority is to be treated as the local authority for these purposes and, in relation to any staithe which is within the Broads and registered as a common, a local authority is to exercise its functions jointly with the Broads Authority or with the consent of that Authority. As to the Broads Authority see **WATER AND WATERWAYS** vol 101 (2009) PARA 734; and as to the meaning of 'staithe' see PARA 427 note 3.

4 Commons Act 1899 s 1(1) (amended by the Local Government Act 1972 Sch 30); Environment Act 1995 Sch 9 para 1(1), (2)(a). Such a scheme may be made (1) at the date at which this volume states the law, in the authority's area with a view to the expenditure of money on the drainage, levelling, and improvement of the common, and to the making of byelaws and regulations for the prevention of nuisances and the preservation of order on the common; (2) as from a day to be appointed, in the public interest: Commons Act 1899 s 1(1) (prospectively amended, so as to substitute for the wording set out in head (1) above the wording set out in head (2) above, by the Commons Act 2006 s 50(1), (2)(a), as from a day to be appointed under s 56(1); at the date at which this volume states the law, no such day had been appointed). For these purposes, the reference to the public interest includes the public interest in (a) nature conservation; (b) the conservation of the landscape; (c) the protection of public rights of access to any area of land; and (d) the protection of archaeological remains and features of historic interest: Commons Act 1899 s 1(1A) (prospectively added by the Commons Act 2006 s 50(1), (2)(b), as from a day to be appointed under s 56(1); at the date at which this volume states the law, no such day had been appointed).

For these purposes, 'common' includes any land subject to be inclosed under the Inclosure Acts 1845 to 1882 (as to which see PARA 419 note 2) and any town or village green: Commons Act 1899 s 15. No scheme for these purposes may, however, apply to a common which is or might be the subject of a scheme under the Metropolitan Commons Acts (see **LONDON GOVERNMENT**), is regulated by a provisional order under the Inclosure Acts (see PARAS 418 et seq, 586 et seq), or has been acquired or managed as an open space under the powers of the Corporation of London (Open Spaces) Act 1878, or any Act therein referred to, or is the subject of any private or local and personal Act of Parliament having for its object the preservation of the common as an open

space, or is subject to byelaws made by a parish council (or now, in Wales, a community council) under the Local Government Act 1894 s 8(1)(d) (application of the Public Health Act 1875 ss 183, 184 (repealed with savings)): Commons Act 1899 s 14. As to the meaning of 'common' generally see PARA 406; and as to the use of the terms 'inclose', 'inclosure' etc see PARA 418 note 2. As to inclosure generally see PARA 418 et seq.

The Commons Act 1899 is merely intended to provide a simple and inexpensive method of enabling local authorities to manage and improve commons and open spaces where no question as to the rights over them is likely to arise, and where the exercise and recreation of the neighbourhood is the principal consideration. According to the *Report of the Royal Commission on Common Land 1955-1958* (Cmnd 462) App III para 53, there had been 258 cases of regulation under the Commons Act 1899, and 149 of inclosure under the Acts specified in Sch 1. The amendments made by the Commons Act 2006 s 50 (not fully in force) are intended to update the power to make schemes under the Commons Act 1899 to make it fit for purpose in the twenty-first century: see HC Official Report SC D (Commons Bill), 27 April 2006, col 145.

5 Commons Act 1899 ss 1(3), 15. For the prescribed forms see the Commons (Schemes) Regulations 1982, SI 1982/209, reg 3, Schedule Form I; and the Commons (Schemes) (Welsh Forms) Regulations 1982, SI 1982/667, reg 2, Schedule Pt I. As to the content of schemes see PARA 591. Parish and community councils may contribute to the expenses of a scheme: see PARA 595.

As from a day to be appointed, regulations under the Commons Act 1899 s 1(3) may (1) prescribe alternative forms; (2) permit exceptions or modifications to be made to any prescribed form: s 1(4) (prospectively added by the Commons Act s 50(1), (4), as from a day to be appointed under s 56(1); at the date at which this volume states the law, no such day had been appointed in relation to England but the Commons Act 1899 s 1(4) was in force for certain purposes in relation to Wales).

6 Commons Act 1899 s 1(3). At the date at which this volume states the law, an ordnance survey map (ie a map made under powers conferred by the Ordnance Survey Act 1841: Interpretation Act 1978 s 5, Sch 1) must, if possible, be used: Commons Act 1899 s 1(3) (prospectively amended, so as to remove this latter requirement, by the Commons Act 2006 s 50(1), (3), as from a day to be appointed under s 56(1); at the date at which this volume states the law, no such day had been appointed). As to the Ordnance Survey generally see **NATIONAL CULTURAL HERITAGE** vol 77 (2010) PARA 1110 et seq.

7 As to the meaning of 'appropriate national authority' see PARA 411 note 1.

8 As to the establishment, status and constitution of commons councils see PARAS 601-602; and as to the functions that may be conferred on them see PARA 604.

9 As to the meaning of 'land' see PARA 403 note 1.

10 Ie by order under the Commons Act 2006 s 26: see PARA 601.

11 See the Commons Act 2006 s 36(1), (2)(c); and PARA 601 note 8.

12 Commons Act 2006 s 36(3). As to public rights of access see PARA 580 et seq; and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 501 et seq.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/6. REGULATION OF COMMONS AND WORKS ON COMMONS/(2) REGULATION OF COMMONS UNDER THE COMMONS ACT 1899/591. Content of schemes.

591. Content of schemes.

A scheme for the regulation and management of non-metropolitan commons¹ may provide, where applicable:

- 403 (1) that free access is to be secured to any particular points of view²;
- 404 (2) that particular trees or objects of historical interest are to be preserved³;
- 405 (3) that where a recreation ground is not set out, there is to be reserved a privilege of playing games or of enjoying other species of recreation at such times and in such manner and on such parts of the common as may be thought suitable, care being taken to cause the least possible injury to the persons interested in the common⁴;
- 406 (4) that carriage roads, bridle paths, and footpaths over such common are to be set out in such directions as may appear most commodious⁵; and
- 407 (5) that any other specified thing is to be done which may be thought equitable and expedient, regard being had to the benefit of the neighbourhood⁶.

It has been held that such a scheme may not grant private rights of way, at least where the owner of the land is known⁷.

1 As to the power to make schemes for the regulation and management of non-metropolitan commons, and as to the commons to which these provisions apply, see PARA 590.

2 Commons Act 1876 s 7(1), applied by the Commons Act 1899 s 1(2).

3 Commons Act 1876 s 7(2), applied by the Commons Act 1899 s 1(2).

4 Commons Act 1876 s 7(3), applied by the Commons Act 1899 s 1(2).

5 Commons Act 1876 s 7(4), applied by the Commons Act 1899 s 1(2).

6 Commons Act 1876 s 7(5), applied by the Commons Act 1899 s 1(2).

7 See *Newbury District Council v Russell* (1997) 95 LGR 705.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/6. REGULATION OF COMMONS AND WORKS ON COMMONS/(2) REGULATION OF COMMONS UNDER THE COMMONS ACT 1899/592. Protection of private rights.

592. Protection of private rights.

In the making of a scheme for the regulation and management of non-metropolitan commons¹ no estate, interest, or right of a profitable or beneficial nature in, over or affecting a common² may, except with the consent of the person entitled to it, be taken away or injuriously affected without compensation³ being made or provided⁴. Nor may a private right of way be granted, at least where the owner of the land is known⁵.

1 As to the power to make schemes for the regulation and management of non-metropolitan commons, and as to the commons to which these provisions apply, see PARA 590.

2 The right to maintain and renew a signpost in front of a public house is such a right: *Hoare v Metropolitan Board of Works* (1874) LR 9 QB 296, DC.

3 Such compensation is to be ascertained and provided in case of difference under the provisions of the Lands Clauses Acts with reference to the compulsory taking or injuriously affecting of lands: see the Commons Act 1899 s 6; the Lands Clauses Consolidation Act 1845 ss 63, 68; the provisions of the Land Compensation Acts 1961 and 1973; and **COMPULSORY ACQUISITION OF LAND**.

4 Commons Act 1899 s 6. The Commons (Schemes) Regulations 1982, SI 1982/209, reg 3, Schedule Form I, and the Commons (Schemes) (Welsh Forms) Regulations 1982, SI 1982/667, reg 2, Schedule Pt I, make provision for the protection of private rights. See also *Ratcliff v Jowers, Barnes Common Case* (1891) 8 TLR 6; *Hoare v Metropolitan Board of Works* (1874) LR 9 QB 296, DC.

5 See *Newbury District Council v Russell* (1997) 95 LGR 705.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/6. REGULATION OF COMMONS AND WORKS ON COMMONS/(2) REGULATION OF COMMONS UNDER THE COMMONS ACT 1899/593. Procedure.

593. Procedure.

As from a day to be appointed¹, the following provisions have effect. A council or authority² is to make and approve a scheme for the regulation and management of non-metropolitan commons³ in the manner prescribed by regulations made by the Secretary of State or, in relation to Wales, by the Welsh Ministers⁴. If, however, at any time before the council or authority has approved of the scheme, it receives a written notice of dissent either:

- 408 (1) from the person entitled as lord of the manor or otherwise to the soil of the common; or
- 409 (2) from persons representing at least one-third in value of such interests in the common as are affected by the scheme,

and such notice is not subsequently withdrawn, the council or authority must not proceed further in the matter⁵. A scheme⁶ for any common may, in prescribed circumstances⁷, be amended in the prescribed manner⁸; and where a new scheme is made⁹ for the whole of a common, a scheme previously made¹⁰ may be revoked in the prescribed manner¹¹.

Until the provisions set out above are brought into force, the procedure for the making of a scheme for the regulation and management of non-metropolitan commons¹² is as follows. Three months at least before making a scheme the council or authority must give notice of its intention to make it¹³, stating where copies of the draft of the scheme and plan may be obtained and where the plan may be inspected¹⁴. The council or authority may then by order approve the scheme subject to such modifications, if any, as it thinks fit, subject to the receipt of a written notice of dissent¹⁵; and the scheme comes into operation when the order approving it has been made¹⁶. The power to make a scheme includes power to amend or supplement a scheme¹⁷.

1 Ie as from a day to be appointed under the Commons Act 2006 s 56(1).

2 As to the councils and authorities empowered to make schemes for the regulation and management of non-metropolitan commons and the commons to which these provisions apply see PARA 590.

3 Ie a scheme under the Commons Act 1899 Pt I (ss 1-15). As to the power to make such schemes for the regulation and management of non-metropolitan commons see PARA 590.

4 Commons Act 1899 s 2(1) (prospectively substituted, for the Commons Act 1899 s 2(1)-(3), and the second paragraph of s 2(4) (see the text and notes 12-16) by the Commons Act 2006 s 50(1), (5)(a), as from a day to be appointed (see note 1); at the date at which this volume states the law, that substitution was in force in relation to Wales for limited purposes only (see the Commons Act 2006 (Commencement No 1, Transitional Provisions and Savings) (Wales) Order 2007, SI 2007/2386, art 2) but had not been brought into force in relation to England); Commons Act 1899 s 15. As to the Secretary of State, and the transfer of functions in relation to Wales to the Welsh Ministers, see PARA 423. As to the regulations see the Commons (Schemes) Regulations 1982, SI 1982/209; the Commons (Schemes) (Welsh Forms) Regulations 1982, SI 1982/667; and notes 13-14.

5 Commons Act 1899 s 2(2) (amended by the Local Government, Planning and Land Act 1980 Sch 3 para 2(1), Sch 34 Pt III; prospectively renumbered as such by the Commons Act 2006 s 50(1), (5)(b), as from a day to be appointed (see note 1); at the date at which this volume states the law, that renumbering was in force in relation to Wales for limited purposes only (see the Commons Act 2006 (Commencement No 1, Transitional Provisions and Savings) (Wales) Order 2007, SI 2007/2386, art 2) but had not been brought into force in relation to England).

6 See note 3.

7 In circumstances prescribed by regulations: see the Commons Act 1899 s 15.

8 Commons Act 1899 s 9(1) (s 9 prospectively substituted by the Commons Act 2006 s 50(1), (6), as from a day to be appointed (see note 1); at the date at which this volume states the law, that substitution was in force in relation to Wales for limited purposes only (see the Commons Act 2006 (Commencement No 1, Transitional Provisions and Savings) (Wales) Order 2007, SI 2007/2386, art 2) but had not been brought into force in relation to England).

9 In under the Commons Act 1899 Pt I.

10 See note 9.

11 Commons Act 1899 s 9(2) (prospectively substituted: see note 8).

12 See note 3.

13 Notice of a council or authority's intention to make a scheme is given by: (1) inserting a notice in at least one newspaper circulating in the neighbourhood of the common to which the proposed scheme relates, the notice to be inserted twice with an interval of not less than one week between the insertions (Commons (Schemes) Regulations 1982, SI 1982/209, reg 4(a)); (2) displaying copies of the notice at two or more places on the common (reg 4(b)); (3) serving a copy of the notice upon the council of every county, parish and community in which the common, or any part of the common, to which the proposed scheme relates is situated (reg 4(c)); (4) sending a copy of the notice to every person entitled to the soil of the common, whether as lord of the manor or otherwise (reg 4(d)); and (5) sending a copy of the notice to every commoner (reg 4(e)). Where a copy of the notice has to be sent: (a) it must be sent by pre-paid registered letter, or by the recorded delivery service (reg 4(i)); (b) in a case where Her Majesty is entitled to the soil of the common, the copy of the notice must be sent to the Crown Estate Commissioners or, where Her Majesty is entitled as Duke of Lancaster, to the Chancellor of the Duchy of Lancaster (reg 4(ii)); (c) in a case where the Duke of Cornwall is entitled to the soil of the common, the copy of the notice must be sent to the Lord Warden of the Stannaries (reg 4(iii)); (d) in a case where the council or authority is satisfied after reasonable inquiry that it is not practicable to ascertain the name or address of any person or commoner, it may dispense with the requirement to send a copy of the notice to that person or, as the case may be, to that commoner (reg 4(iv)); and (e) in a case where the council or authority considers that the commoners are too numerous, it may dispense with the requirement to send a copy of the notice to the commoners (reg 4(v)). As to areas and authorities in England and Wales see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq. As to the Crown Estate and the Crown Estate Commissioners see **CROWN PROPERTY** vol 12(1) (Reissue) PARA 278 et seq. The notice must be in the form set out in the Commons (Schemes) Regulations 1982, SI 1982/209, Schedule Form II, or the Commons (Schemes) (Welsh Forms) Regulations 1982, SI 1982/667, Schedule Pt II, or a form to the like effect: Commons (Schemes) Regulations 1982, SI 1982/209, reg 4(a); Commons (Schemes) (Welsh Forms) Regulations 1982, SI 1982/667, reg 4.

14 Commons Act 1899 s 2(1) (as originally enacted; amended by the Local Government, Planning and Land Act 1980 Sch 3 para 2(1), Sch 34 Pt III). During the three month period copies of the draft scheme may be obtained, the plan inspected, and objections or suggestions in writing made to the council by any person; after the expiration of the three months the council must take into consideration any objections or suggestions so made, and may if it thinks fit direct a local inquiry by one of its officers: Commons Act 1899 s 2(2), (3) (as originally enacted; s 2(2) amended by virtue of the Decimal Currency Act 1969 s 10(1); the Commons Act 1899 s 2(2)-(4) amended by the Local Government, Planning and Land Act 1980 ss 1(3), 194, Sch 3 para 2(1)). Copies of the draft scheme must be placed on sale at the offices of the council or authority making the scheme for such reasonable price as the council or authority may determine: Commons (Schemes) Regulations 1982, SI 1982/209, reg 5.

15 Commons Act 1899 s 2(4) (as originally enacted and as amended: see note 14). As to notices of dissent and the effects thereof see PARA 592.

16 Commons Act 1899 s 2(4) (as originally enacted and as amended: see note 14).

17 Commons Act 1899 s 9 (as originally enacted).

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/6. REGULATION OF COMMONS AND WORKS ON COMMONS/(2) REGULATION OF COMMONS UNDER THE COMMONS ACT 1899/594. Management of commons regulated by schemes.

594. Management of commons regulated by schemes.

Once a scheme for the regulation and management of a non-metropolitan common¹ has been approved², the management of the common is vested in the district, county or county borough council³ which made the scheme⁴. No provision is made for the management of a common which is regulated in pursuance of a scheme made by a National Park authority⁵ or the Broads Authority⁶, but it may be assumed⁷ that the management of such a common would be vested in the authority which made the scheme. Provision is also made for the making of byelaws and for the payment and recovery of fines to and by the council or authority in which the management of a regulated common is vested⁸.

1 As to the power to make schemes for the regulation and management of non-metropolitan commons, and as to the commons to which these provisions apply, see PARA 590.

2 As to the approval of a scheme see PARA 593.

3 The Commons Act 1899 s 3 refers to 'the district council' but in practice this is a reference to a district council in England and a county or county borough council in Wales: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq.

4 Commons Act 1899 s 3.

5 As to National Parks and National Park authorities see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 636 et seq; **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 526 et seq.

6 As to the Broads Authority see **WATER AND WATERWAYS** vol 101 (2009) PARA 734.

7 Ie by virtue of the operation of the Environment Act 1995 s 70, Sch 9 para 1(1), (2)(a), (3), (5); the Norfolk and Suffolk Broads Act 1988 s 2(6), Sch 3 Pt II para 38 (see PARA 590 notes 2-3); and the Commons Act 1899 s 3.

8 See the Commons Act 1899 s 10 (prospectively substituted by the Commons Act 2006 s 50(1), (6), as from a day to be appointed under s 56(1); at the date at which this volume states the law, that substitution was in force in relation to Wales for limited purposes only (see the Commons Act 2006 (Commencement No 1, Transitional Provisions and Savings) (Wales) Order 2007, SI 2007/2386, art 2) but had not been brought into force in relation to England).

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/6. REGULATION OF COMMONS AND WORKS ON COMMONS/(2) REGULATION OF COMMONS UNDER THE COMMONS ACT 1899/595. Expenses of scheme.

595. Expenses of scheme.

All the expenses of and incidental to the preparation and execution of a scheme for the regulation and management of a non-metropolitan common¹ must be paid by the district, county or county borough council² which made the scheme³. No provision is made for the defrayment of expenses arising from a scheme made by a National Park authority⁴ or the Broads Authority⁵, but it may be assumed⁶ that the defrayment of expenses would be the responsibility of the authority which made the scheme.

A parish or community council⁷ may agree to contribute the whole or any portion of the expenses in respect of a scheme for the regulation and management of any common within the parish or community⁸.

A district, county or county borough council⁹ or a National Park authority¹⁰ may, with a view to the benefit of the inhabitants of its district or area, enter into an undertaking with any other council or authority making or having made a scheme to contribute any portion of the expenses incurred by that council or authority in executing the scheme¹¹.

1 As to the power to make schemes for the regulation and management of non-metropolitan commons, and as to the commons to which these provisions apply, see PARA 590.

2 The Commons Act 1899 s 11 refers to 'the district council', and s 12 refers to 'the council of any urban district', but in practice these are references to a district council in England and a county or county borough council in Wales: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq.

3 Commons Act 1899 s 11 (substituted by the Local Government, Planning and Land Act 1980 Sch 3 para 2(2)). These expenses presumably include compensation for loss of or injury to private rights (see PARA 592).

4 As to National Parks and National Park authorities see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 636 et seq; **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 526 et seq.

5 As to the Broads Authority see **WATER AND WATERWAYS** vol 101 (2009) PARA 734.

6 Ie by virtue of the operation of the Environment Act 1995 s 70, Sch 9 para 1(1), (2)(a), (3), (5); the Norfolk and Suffolk Broads Act 1988 s 2(6), Sch 3 Pt II para 38 (see PARA 590 notes 2-3); and the Commons Act 1899 s 11 (as substituted: see note 3).

7 The Commons Act 1899 s 5 refers only to 'a parish council' but in practice this is a reference to a parish council in England and a community council in Wales: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq.

8 Commons Act 1899 s 5 (amended by the Local Government Act 1933 Sch 11 Pt IV).

9 See note 2.

10 A National Park authority may exercise the powers conferred by the Commons Act 1899 s 12: Environment Act 1995 s 70, Sch 9 para 1(3).

11 Commons Act 1899 s 12 (amended by the Local Government, Planning and Land Act 1980 Sch 3 para 3, Sch 34 Pt III).

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/6. REGULATION OF COMMONS AND WORKS ON COMMONS/(2) REGULATION OF COMMONS UNDER THE COMMONS ACT 1899/596. Acquisition of property in regulated common.

596. Acquisition of property in regulated common.

A district, county or county borough council¹ or a National Park authority² may, by gift or by purchase by agreement, acquire the fee simple or any estate in, or any rights in or over, any common regulated by a scheme for the regulation and management of a non-metropolitan common³, and may hold the same for the purposes of the scheme⁴.

1 The Commons Act 1899 s 7 refers to 'a district council', but in practice this is a reference to a district council in England and a county or county borough council in Wales: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq. As to the powers of these councils (and National Park authorities and the Broads Authority) to make schemes see PARA 590.

2 A National Park authority may exercise the powers conferred by the Commons Act 1899 s 12: Environment Act 1995 s 70, Sch 9 para 1(3). As to National Parks and National Park authorities see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 636 et seq; **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 526 et seq.

3 As to the power to make schemes for the regulation and management of non-metropolitan commons, and as to the commons to which these provisions apply, see PARA 590.

4 Commons Act 1899 s 7 (amended by the Local Government Act 1933 Sch 11 Pt IV (repealed); and by the Statute Law Revision Act 1963).

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/6. REGULATION OF COMMONS AND WORKS ON COMMONS/(2) REGULATION OF COMMONS UNDER THE COMMONS ACT 1899/597. Prohibition on getting of road materials from regulated common.

597. Prohibition on getting of road materials from regulated common.

When a non-metropolitan common is the subject of a scheme for the regulation and management of non-metropolitan commons¹ no highway authority² has power to search for or get gravel, sand, stone or other materials for road repairs from any part of the common which has not been set apart for that purpose with the sanction of Parliament, without the consent of the persons or body who have the regulation or management of the common, or, in default of such consent, without an order of two or more justices of the peace, who may in their order prescribe conditions as to the mode of working and the restitution of the surface as they deem expedient³.

1 As to the power to make schemes for the regulation and management of non-metropolitan commons, and as to the commons to which these provisions apply, see PARA 590.

2 As to the highway authorities see **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 49 et seq.

3 Commons Act 1876 s 20 (amended by the Statute Law Revision Act 1894; the Statute Law (Repeals) Act 1998; and the Courts Act 2003 Sch 8 para 54); applied by the Commons Act 1899 s 8. Under the Commons Act 1876 s 20 the justices have an absolute discretion as to making or refusing to make an order: *Hayes Common Conservators v Bromley RDC* [1897] 1 QB 321, DC. The provision of an allotment for the supply of materials for the repair of the roads in the parish was usual in inclosures, and is not uncommon in cases of regulation. As to the use of the terms 'inclose', 'inclosure' etc see PARA 418 note 2; and as to inclosure generally see PARA 418 et seq.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/6. REGULATION OF COMMONS AND WORKS ON COMMONS/(2) REGULATION OF COMMONS UNDER THE COMMONS ACT 1899/598. Exemption from registration under the Commons Registration Act 1965 but not under the Commons Act 2006.

598. Exemption from registration under the Commons Registration Act 1965 but not under the Commons Act 2006.

The Secretary of State¹ might by order exempt from the requirement of registration under the Commons Registration Act 1965² any land regulated by a scheme for the regulation of non-metropolitan commons³, provided that no rights of common had been exercised over it for at least 30 years and that the owner of the land was known⁴. Land exempted by such an order is not, however, excluded from the operation of Part 1 of the Commons Act 2006⁵ and may qualify for registration under the provisions of that Act allowing for the registration of common land not previously registered⁶.

Where land regulated by such a scheme has not been registered as common land, the carrying out of certain works on it without the consent of the appropriate national authority⁷ is nevertheless restricted by the Commons Act 2006⁸.

1 As to the Secretary of State see PARA 423. Functions under the Commons Registration Act 1965 were transferred, in relation to Wales, to the National Assembly for Wales in 1999 and are now exercisable by the Welsh Ministers (see PARA 423) but the functions described in the text were no longer capable of being exercised at the date of that transfer: see PARA 509 text and note 10.

2 As to the requirement of registration see PARA 403; and as to registration under the Commons Registration Act 1965 see PARA 506 et seq.

3 As to the power to make schemes for the regulation and management of non-metropolitan commons, and as to the commons to which these provisions apply, see PARA 590.

4 See the Commons Registration Act 1965 s 11(1)-(3); and PARA 509.

5 Ie the Commons Act 2006 Pt 1 (ss 1-25) (not fully in force).

6 See the Commons Act 2006 Sch 2 para 2 (not fully in force); and PARA 535.

7 As to the meaning of 'appropriate national authority' see PARA 411 note 1.

8 See the Commons Act 2006 Pt 3 (ss 38-44) (not fully in force in relation to Wales); and PARA 612 et seq.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/6. REGULATION OF COMMONS AND WORKS ON COMMONS/(3) REGULATION OF COMMONS UNDER THE COMMONS ACT 1908/599. Schemes under the Commons Act 1908.

(3) REGULATION OF COMMONS UNDER THE

599. Schemes under the Commons Act 1908.

The persons for the time being entitled to turn out animals¹ on a common² may by resolution³ make, alter or revoke regulations⁴:

- 410 (1) for determining the times at which, and the conditions under which, entire animals⁵ or entire animals of any specified class, description or age may be upon the common⁶;
- 411 (2) for authorising the removal of any animal found upon the common in contravention of the regulations, and for the detention and disposal of any animal so removed⁷;
- 412 (3) for appointing and removing, or providing for the appointment and removal of, officers to enforce such regulations⁸;
- 413 (4) for raising such sums as may be necessary for the defraying of the expenses of making, publishing or enforcing the regulations and for prescribing the person to receive or sue for such payments⁹; and
- 414 (5) constituting and regulating the constitution of a committee consisting of persons entitled to turn out animals on the common, and delegating to that committee such of the powers exercisable by resolution¹⁰ as may be specified in the resolution¹¹.

The owner of any animal which is found on any common in contravention of the regulations and any person who obstructs any officer in the execution or enforcement of the regulations commits an offence¹².

If it appears to the appropriate national authority¹³ desirable to do so in consequence of functions conferred on a commons council¹⁴ in relation to any land¹⁵, that authority may by order¹⁶ vary or revoke any regulations or arrangement made under the above provisions¹⁷.

1 'Animals' means horses, asses, cattle, sheep, goats, and swine: Commons Act 1908 s 1(9).

2 'Common' includes any commonable land, and two or more adjoining commons may by order of the Secretary of State or, in relation to Wales, by the Welsh Ministers be declared to be one common and treated for these purposes accordingly: Commons Act 1908 s 1(7), (9). As to commonable lands see PARA 407. As to the Secretary of State, and the transfer of functions in relation to Wales to the Welsh Ministers, see PARA 423. These provisions apply to a common vested in Her Majesty by right of the Crown or the Duchy of Lancaster or forming part of the possessions of the Duchy of Cornwall, but do not apply to the New Forest or any common in respect of which there is a power to make byelaws as to matters for which regulations may be made under the Commons Act 1908: s 1(8). As to the application of these provisions to Dartmoor see s 2.

3 The resolution must be passed by a majority in value of interest of the persons present by themselves or by their proxy or attorney: Commons Act 1908 s 1(1). As to the procedure for the passing of resolutions see PARA 600.

4 Regulations, and any alteration or revocation of them, do not take effect until confirmed by the Secretary of State or the Welsh Ministers, who may confirm them either without modification or subject to such modifications as, after considering any objections by persons appearing to be interested, he considers, or they consider, desirable: Commons Act 1908 s 1(1). No regulation so approved may be questioned on the ground of informality, and the Documentary Evidence Acts (see **CIVIL PROCEDURE** vol 11 (2009) PARA 892) apply to

regulations so approved as if they were regulations made by the Secretary of State or the Welsh Ministers: Commons Act 1908 s 1(6).

These powers have been little used, only 17 cases having occurred, the last being in 1936: see the *Report of the Royal Commission on Common Land 1955-1958* (Cmnd 462) App III para 54.

5 Ie male animals which have not been castrated.

6 Commons Act 1908 s 1(1)(a).

7 Commons Act 1908 s 1(1)(a). The removal of animals may be authorised by an officer appointed by the persons for the time being entitled to turn out animals on the common for the purposes of enforcing the regulations: s 1(1)(a), (b).

8 Commons Act 1908 s 1(1)(b).

9 Commons Act 1908 s 1(1)(a). Sums may be raised or defrayed either by annual contributions payable by the persons for the time being entitled to turn out animals on the common, or by way of an annual payment in respect of each animal turned out on the common: s 1(1)(a).

10 Ie under the Commons Act 1908.

11 Commons Act 1908 s 1(1)(c).

12 Commons Act 1908 s 1(2). A person who commits such an offence is liable on summary conviction to a fine not exceeding level 1 on the standard scale or, in the case of a continuing offence, a sum not exceeding 50 pence for every day during which the offence continues: s 1(2) (amended by the Justices of the Peace Act 1949 Sch 7 Pt III; and by virtue of the Decimal Currency Act 1969 s 10(1) and the Criminal Justice Act 1982 ss 37, 46). As to the standard scale see PARA 421 note 3.

13 As to the meaning of 'appropriate national authority' see PARA 411 note 1.

14 As to the establishment, status and constitution of commons councils see PARAS 601-602; and as to the functions that may be conferred on them see PARA 604.

15 As to the meaning of 'land' see PARA 403 note 1.

16 Ie by order under the Commons Act 2006 s 26: see PARA 601.

17 See the Commons Act 2006 s 36(1), (2)(b); and PARA 601 note 8.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/6. REGULATION OF COMMONS AND WORKS ON COMMONS/(3) REGULATION OF COMMONS UNDER THE COMMONS ACT 1908/600. Procedure.

600. Procedure.

The meeting at which a resolution regulating the use of a common¹ by entire animals² is passed³ may be convened by the Secretary of State or the Welsh Ministers⁴ upon the application of:

- 415 (1) any three persons claiming to be entitled to turn out animals upon the common⁵; or
- 416 (2) the council of the county, county borough or metropolitan district⁶ in which any part of the common is situate⁷.

The meeting is convened and held, proxies and attorneys⁸ are appointed, and the value of the interest of any person for the time being entitled to turn out animals on the common ascertained, in accordance with rules made by the Secretary of State or the Welsh Ministers⁹. If any question arises whether a resolution has been passed by the required majority, the question is determined by the Secretary of State or the Welsh Ministers, whose decision is final, but the decision does not otherwise affect or prejudice any right or claim in respect of a common¹⁰.

1 As to the meaning of 'common' see PARA 599 note 2.

2 As to the meanings of 'animals' and 'entire animals' see PARA 599 notes 1, 5.

3 See PARA 599.

4 As to the Secretary of State, and the transfer of functions in relation to Wales to the Welsh Ministers, see PARA 423.

5 Commons Act 1908 s 1(3).

6 As to local government areas and authorities in England and Wales see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq.

7 Commons Act 1908 s 1(3) (amended by the Local Government Act 1985 Sch 8 para 10(4); and by the Local Government (Wales) Act 1994 Sch 16 para 5).

8 As to the role of proxies and attorneys see PARA 599 note 3.

9 Commons Act 1908 s 1(4). By the Commons Rules 1966, SI 1966/96, the value of the interest of any person for the time being entitled to turn out animals on to a common is to be measured either by numbers or by stints; or, if the interests are not so defined, by acreage, no account being taken of half an acre, and areas of rough grazing being deemed to comprise one quarter only of the actual acreage; or in any other case, in such manner as the Secretary of State thinks, or the Welsh Ministers think, proper: rr 3, 11. The rules further provide for a meeting to be convened by the Secretary of State or the Welsh Ministers by a notice stating generally the object of the meeting and the date and place of the meeting; 21 clear days' notice must be given: r 4. The persons entitled to vote must appoint a chairman who may be one of themselves, or, with the approval of the Secretary of State or the Welsh Ministers, any other person (r 5); the chairman may adjourn the meeting but if it is adjourned for more than seven days, notice of the adjourned meeting must be given as in the case of an original meeting (r 6). Minutes of all proceedings and resolutions must be made and the chairman must sign them and deliver them to the Secretary of State or the Welsh Ministers, who may act on them without requiring further or other evidence as to any matter appearing therein (r 7). Unless a poll is demanded by one or more persons present in person or by proxy or by attorney and entitled to turn out animals on the common, a resolution may be decided by the chairman on a show of hands (r 8); if a poll is demanded, as in r 8, it must be

taken forthwith in such manner as the chairman directs (r 9). The chairman may require any vote to be taken by poll: r 10. Provision is made for the giving of votes either personally or by proxy or attorney: rr 12-14.

10 Commons Act 1908 s 1(5).

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/6. REGULATION OF COMMONS AND WORKS ON COMMONS/(4) REGULATION BY COMMONS COUNCILS UNDER THE COMMONS ACT 2006/601. Establishment of commons councils.

(4) REGULATION BY COMMONS COUNCILS UNDER THE

601. Establishment of commons councils.

As from a day to be appointed by order made by the appropriate national authority¹, that authority may, for any area or areas of land² that:

- 417 (1) is registered as common land³; or
- 418 (2) is registered as a town or village green⁴ and is subject to rights of common⁵,

establish a body corporate to be known as a 'commons council' to carry out functions conferred under Part 2⁶ of the Commons Act 2006⁷.

A commons council is to be established by an order⁸ which must specify the name of the council and the area or areas of land for which the council is established⁹. Where the appropriate national authority proposes to make such an order, that authority must publish a draft of the proposed order in such manner as it thinks fit and must invite representations about it¹⁰; and the authority may cause a local inquiry to be held¹¹.

The appropriate national authority may not make the proposed order unless, having regard to any representations received¹² and to the result of any local inquiry held¹³, it is satisfied that there is substantial support for the making of the order¹⁴. For these purposes, it must have particular regard to representations received¹⁵ from:

- 419 (a) persons having rights (other than rights of common) in relation to, or occupying, land specified in the draft order;
- 420 (b) persons who are entitled to exercise rights of common (and in particular persons exercising rights of common) over any such land; and
- 421 (c) persons with functions under an enactment which relate to the maintenance or management of any such land¹⁶.

At the date at which this volume states the law, however, the above provisions were not in force.

¹ ie as from a day to be appointed by order made by the appropriate national authority under the Commons Act 2006 s 56(1). At the date at which this volume states the law, no such day had been appointed. As to the meaning of 'appropriate national authority' see PARA 411 note 1.

² As to the meaning of 'land' see PARA 403 note 1.

³ As to the meaning of 'land registered as common land' see PARA 424 note 7.

⁴ As to the meaning of 'land registered as a town or village green' see PARA 424 note 12. As to land which may be registered in England and Wales as a town or village green under the Commons Act 2006 see s 15; and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 541.

⁵ As to the meaning of 'right of common' see PARA 405.

⁶ ie functions conferred under the Commons Act 2006 Pt 2 (ss 26-37) (not yet in force): see PARA 602 et seq.

7 Commons Act 2006 s 26(1)-(3) (not yet in force).

8 See the Commons Act 2006 s 26(4) (not yet in force). As to the making of orders generally see s 59.

The appropriate national authority may by order under s 26 make any provision specified in s 36(2) if it appears to the authority desirable to do so in consequence of functions conferred on a commons council in relation to any land: s 36(1) (not yet in force). The provision referred to in s 36(1) is provision to (1) vary or abolish the jurisdiction so far as relating to the land of any court of a description referred to in the Administration of Justice Act 1977 Sch 4 Pt 1 (certain ancient courts: see **COURTS** vol 10 (Reissue) PARA 855); (2) vary or revoke any regulations or arrangement made under the Commons Act 1908 (see PARA 599 et seq); (3) vary or revoke any scheme made under the Commons Act 1899 (see PARA 590 et seq), or any arrangement arising under such a scheme; (4) vary or revoke any Act made under the Commons Act 1876 confirming a provisional order of the Inclosure Commissioners (see PARAS 419 et seq, 586) or any arrangement arising under such an Act; (5) vary or revoke any local or personal Act, or any scheme or arrangement under such an Act, which relates to the management or maintenance of, or the exercise of rights of common over, the land: Commons Act 2006 s 36(2) (not yet in force). The appropriate national authority may not, however, so make provision specified in s 36(2) (c)-(e) (see heads (3)-(5) above) to the extent that to do so would have the effect of abolishing or restricting a right of access of whatever nature exercisable by members of the public generally or by any section of the public: s 36(3) (not yet in force). As to public rights of access see PARA 580 et seq; and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 501 et seq.

9 See the Commons Act 2006 s 26(5) (not yet in force). Orders establishing individual commons councils are local in nature and are not recorded in this work.

10 Commons Act 2006 s 27(1), (2) (not yet in force).

11 Commons Act 2006 s 27(3) (not yet in force).

12 Ie pursuant to the Commons Act 2006 s 27(2)(b): see the text to note 10.

13 Ie held under the Commons Act 2006 s 27(3): see the text to note 11.

14 Commons Act 2006 s 27(4) (not yet in force).

15 See note 12.

16 Commons Act 2006 s 27(5) (not yet in force).

UPDATE

601-607 Regulation by Commons Councils under the Commons Act 2006

These provisions in force as from 20 January 2010: SI 2010/61.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/6. REGULATION OF COMMONS AND WORKS ON COMMONS/(4) REGULATION BY COMMONS COUNCILS UNDER THE COMMONS ACT 2006/602. Status and constitution of commons councils.

602. Status and constitution of commons councils.

As from a day to be appointed by order made by the appropriate national authority¹, the following provisions have effect.

A commons council² is not to be regarded as the servant or agent of the Crown or as enjoying any status, immunity or privilege of the Crown³ and its property is not to be regarded as the property of, or as property held on behalf of, the Crown⁴. Nor is a commons council to be regarded as a section 28G authority⁵ for the purposes of the Wildlife and Countryside Act 1981⁶.

The appropriate national authority must by regulations⁷ prescribe standard terms as to the constitution and administration of commons councils (the 'standard constitution')⁸. The terms of the standard constitution apply to every commons council, subject as follows⁹. An order establishing a commons council¹⁰ may also make provision as to the constitution and administration of a commons council¹¹. Provision which may be so made¹² includes in particular:

- 422 (1) provision supplementary to any term of the standard constitution;
- 423 (2) provision disapplying any such term;
- 424 (3) provision replacing any such term¹³.

Where in relation to a commons council provision is so made¹⁴ that is inconsistent with any term of the standard constitution, and any such term has not been expressly disappplied by the order in question, the provision made by that order prevails, to the extent of the inconsistency, over the term of the standard constitution¹⁵.

The following provisions apply in relation to terms as to the constitution and administration of a commons council contained in the standard constitution or in an order¹⁶ establishing the council¹⁷. The terms may in particular include terms as to:

- 425 (a) the membership of the council¹⁸;
- 426 (b) participation in the council by persons other than members¹⁹;
- 427 (c) the proceedings of the council²⁰;
- 428 (d) the keeping and publication of accounts, annual reports and other information relating to the council²¹.

Subject to any terms made of the kind referred to in head (c) above, a commons council may regulate its own proceedings²².

At the date at which this volume states the law, however, the above provisions were not in force.

¹ ie as from a day to be appointed by order made by the appropriate national authority under the Commons Act 2006 s 56(1). At the date at which this volume states the law, no such day had been appointed. As to the meaning of 'appropriate national authority' see PARA 411 note 1.

² 'Commons council' means a commons council established under the Commons Act 2006 Pt 2 (ss 26-37): s 61(1). As to the establishment of commons councils see PARA 601.

³ Commons Act 2006 s 28(1) (not yet in force).

4 Commons Act 2006 s 28(2) (not yet in force).

5 le an authority to which the Wildlife and Countryside Act 1981 s 28G (statutory undertakers etc; general duty: see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 682) applies: see s 28G(1) (added by the Countryside and Rights of Way Act 2000 Sch 9 para 1).

6 See the Commons Act 2006 s 28(3) (not yet in force).

7 'Regulations' means regulations made by the appropriate national authority: Commons Act 2006 s 61(1). As to the making of regulations generally see s 59.

8 Commons Act 2006 s 29(1) (not yet in force). Terms of the standard constitution prescribed by regulations under s 29(1) may be amended by further regulations under that provision; and s 29 applies in relation to such terms as amended as it applies in relation to the terms as first prescribed: s 29(6) (not yet in force).

9 Commons Act 2006 s 29(2) (not yet in force).

10 le an order under the Commons Act 2006 s 26 (not yet in force): see PARA 601.

11 Commons Act 2006 s 29(3) (not yet in force).

12 le made under the Commons Act 2006 s 29(3) (not yet in force): see the text and notes 10-11.

13 Commons Act 2006 s 29(4) (not yet in force).

14 See note 12.

15 See the Commons Act 2006 s 29(5) (not yet in force).

16 See note 10.

17 See the Commons Act 2006 s 30(1) (not yet in force).

18 Commons Act 2006 s 30(2)(a) (not yet in force). The terms referred to in s 30(2)(a) include in particular terms as to (1) the appointment of members (by election or otherwise); (2) the term for which members are appointed; (3) co-option of members; (4) the conduct of members; (5) resignation and disqualification of members; (6) termination and renewal of membership; (7) payment of allowances to members: s 30(3) (not yet in force).

19 Commons Act 2006 s 30(2)(b) (not yet in force). The terms referred to in s 30(2)(b) include in particular terms as to (1) entitlement to elect members; (2) entitlement to attend meetings: s 30(4) (not yet in force).

20 Commons Act 2006 s 30(2)(c) (not yet in force). The terms referred to in s 30(2)(c) include in particular terms as to (1) the frequency of meetings; (2) voting procedures at meetings; (3) committees and sub-committees: s 30(5) (not yet in force).

21 Commons Act 2006 s 30(2)(d) (not yet in force). The terms referred to in s 30(2)(d) include in particular terms as to (1) the appointment of auditors; (2) the preparation and publication of accounts; (3) the preparation and publication of annual reports: s 30(6) (not yet in force).

22 Commons Act 2006 s 30(7) (not yet in force).

UPDATE

601-607 Regulation by Commons Councils under the Commons Act 2006

These provisions in force as from 20 January 2010: SI 2010/61.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/6. REGULATION OF COMMONS AND WORKS ON COMMONS/(4) REGULATION BY COMMONS COUNCILS UNDER THE COMMONS ACT 2006/603. Variation and revocation of establishment orders.

603. Variation and revocation of establishment orders.

As from a day to be appointed by order made by the appropriate national authority¹, that authority may by order² revoke a previous order establishing a commons council³ only if it is satisfied that:

- 429 (1) the council has ceased to operate;
- 430 (2) the council is failing to discharge its functions in an effective manner; or
- 431 (3) the council is, in discharging its functions, failing to have sufficient regard to the public interest as it is statutorily required⁴ to do⁵.

An order revoking a previous order establishing a commons council⁶ may include:

- 432 (a) provision for the transfer of rights, property and liabilities of the commons council;
- 433 (b) provision amending any enactment previously amended⁷ in relation to the council⁸.

At the date at which this volume states the law, however, the above provisions were not in force.

1 le as from a day to be appointed by order made by the appropriate national authority under the Commons Act 2006 s 56(1). At the date at which this volume states the law, no such day had been appointed. As to the meaning of 'appropriate national authority' see PARA 411 note 1.

2 le by order under the Commons Act 2006 s 26 (not yet in force): see PARA 601. As to the making of orders generally see s 59. Section 27 (not yet in force) (see PARA 601) applies to an order under s 26 varying or revoking a previous order under s 26 as it applies to an order under s 26 establishing a commons council (but as if the references in s 27 to land specified in the order were to land affected by the variation or revocation): s 37(3) (not yet in force). As to the meaning of 'commons council' see PARA 602 note 1; and as to the meaning of 'land' see PARA 403 note 1.

3 le a previous order under the Commons Act 2006 s 26 (not yet in force): see PARA 601.

4 le as required by the Commons Act 2006 s 31 (not yet in force): see PARA 604.

5 See the Commons Act 2006 s 37(1) (not yet in force).

6 See note 3.

7 le amended under the Commons Act 2006 s 36 (not yet in force): see PARA 601 note 8.

8 Commons Act 2006 s 37(2) (not yet in force).

UPDATE

601-607 Regulation by Commons Councils under the Commons Act 2006

These provisions in force as from 20 January 2010: SI 2010/61.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/6. REGULATION OF COMMONS AND WORKS ON COMMONS/(4) REGULATION BY COMMONS COUNCILS UNDER THE COMMONS ACT 2006/604. Functions of commons councils.

604. Functions of commons councils.

As from a day to be appointed by order made by the appropriate national authority¹, the following provisions have effect.

An order establishing a commons council² is to confer on that council functions relating to any one or more of the following:

- 434 (1) the management of agricultural activities on the land³ for which the council is established;
- 435 (2) the management of vegetation on the land;
- 436 (3) the management of rights of common⁴ on the land⁵;

and the functions so conferred on a commons council must be those the appropriate national authority considers appropriate in the case of that council⁶. The functions which may be so conferred on a commons council include in particular functions of:

- 437 (a) making rules⁷ relating to agricultural activities, the management of vegetation and the exercise of rights of common on the land for which the council is established⁸;
- 438 (b) making rules⁹ relating to the leasing or licensing of rights of common¹⁰;
- 439 (c) preparing and maintaining a register of grazing¹¹;
- 440 (d) establishing and maintaining boundaries¹²;
- 441 (e) removing unlawful boundaries and other encroachments¹³;
- 442 (f) removing animals unlawfully permitted to graze¹⁴.

A commons council must discharge its functions having regard to:

- 443 (i) any guidance given by the appropriate national authority; and
- 444 (ii) the public interest¹⁵ in relation to the land for which it is established¹⁶.

The appropriate national authority may by direction revoke any rule made by a commons council¹⁷. Such a direction must set out the reason why the rule is being revoked¹⁸. Before so revoking any rule, the appropriate national authority must consult the commons council and any other person it thinks appropriate¹⁹.

At the date at which this volume states the law, however, the above provisions were not in force.

¹ ie as from a day to be appointed by order made by the appropriate national authority under the Commons Act 2006 s 56(1). At the date at which this volume states the law, no such day had been appointed. As to the meaning of 'appropriate national authority' see PARA 411 note 1.

² ie an order under the Commons Act 2006 s 26 (not yet in force): see PARA 601.

³ As to the meaning of 'land' see PARA 403 note 1.

⁴ As to the meaning of 'rights of common' see PARA 405.

5 Commons Act 2006 s 31(1) (not yet in force).

6 Commons Act 2006 s 31(2) (not yet in force).

7 An order under the Commons Act 2006 s 26 (not yet in force) (see PARA 601) conferring a power to make rules may provide for the procedure to be followed in the exercise of the power (and may in particular require the consent of the appropriate national authority to be obtained before rules are made): s 35(2) (not yet in force). Any power to make rules conferred on a commons council under s 31 (not yet in force) includes power to vary or revoke the rules made by the council: s 35(1) (not yet in force). As to enforcement of the rules see PARA 607.

8 Commons Act 2006 s 31(3)(a) (not yet in force). Rules made by virtue of s 31(3)(a) (see head (a) in the text) may have the effect of: (1) limiting or imposing conditions on the exercise of rights of common over, or the exercise of rights to use the surplus of, the land for which the council is established; (2) requiring the provision of information to the commons council in relation to the exercise of those rights: s 31(4) (not yet in force).

9 See note 7.

10 Commons Act 2006 s 31(3)(b) (not yet in force).

11 Commons Act 2006 s 31(3)(c) (not yet in force).

12 Commons Act 2006 s 31(3)(d) (not yet in force).

13 Commons Act 2006 s 31(3)(e) (not yet in force).

14 Commons Act 2006 s 31(3)(f) (not yet in force). In exercising a function conferred under s 31(3)(f) (see head (f) in the text), a commons council may (1) dispose of any animal it removes; and (2) recover from the owner of the animal the costs that it may reasonably incur in removing and disposing of it: s 31(5) (not yet in force).

15 The reference in the Commons Act 2006 s 31(6)(b) (see head (ii) in the text) to the public interest includes the public interest in (1) nature conservation; (2) the conservation of the landscape; (3) the protection of public rights of access to any area of land; and (4) the protection of archaeological remains and features of historic interest: s 31(7) (not yet in force). As to the meaning of 'nature conservation' see PARA 547 note 5; and as to public rights of access see PARA 580 et seq. As to the protection of archaeological remains and features of historic interest see further **NATIONAL CULTURAL HERITAGE**.

16 Commons Act 2006 s 31(6) (not yet in force).

17 Commons Act 2006 s 35(3) (not yet in force).

18 Commons Act 2006 s 35(4) (not yet in force).

19 Commons Act 2006 s 35(5) (not yet in force).

UPDATE

601-607 Regulation by Commons Councils under the Commons Act 2006

These provisions in force as from 20 January 2010: SI 2010/61.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/6. REGULATION OF COMMONS AND WORKS ON COMMONS/(4) REGULATION BY COMMONS COUNCILS UNDER THE COMMONS ACT 2006/605. Ancillary powers of commons councils.

605. Ancillary powers of commons councils.

As from a day to be appointed by order made by the appropriate national authority¹, the following provisions have effect.

A commons council² has the power to do anything which it considers will facilitate, or is conducive or incidental to, the carrying out of its functions³. The power so conferred includes power to:

- 445 (1) enter into agreements⁴;
- 446 (2) prepare and adopt management plans⁵;
- 447 (3) raise money, including by applying for funds from any source⁶;
- 448 (4) acquire or dispose of land⁷;
- 449 (5) employ staff⁸.

At the date at which this volume states the law, however, the above provisions were not in force.

¹ ie as from a day to be appointed by order made by the appropriate national authority under the Commons Act 2006 s 56(1). At the date at which this volume states the law, no such day had been appointed. As to the meaning of 'appropriate national authority' see PARA 411 note 1.

² As to the establishment, status and constitution of commons councils see PARAS 601-602.

³ Commons Act 2006 s 32(1) (not yet in force). As to the functions of commons councils see PARA 604.

⁴ Commons Act 2006 s 32(2)(a) (not yet in force).

⁵ Commons Act 2006 s 32(2)(b) (not yet in force).

⁶ Commons Act 2006 s 32(2)(c) (not yet in force). The power of a commons council to raise money as specified in s 32(2)(c) (see head (3) in the text) includes power to require the payment of fees in connection with (1) the exercise of rights of common over, or the exercise of rights to use the surplus of, the land for which the council is established; and (2) participation in the council; and any such fees owed to the council may be recovered as a debt due to it: s 32(3) (not yet in force). As to the meaning of 'rights of common' see PARA 405; and as to the meaning of 'land' see PARA 403 note 1.

⁷ Commons Act 2006 s 32(2)(d) (not yet in force).

⁸ Commons Act 2006 s 32(2)(e) (not yet in force).

UPDATE

601-607 Regulation by Commons Councils under the Commons Act 2006

These provisions in force as from 20 January 2010: SI 2010/61.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/6. REGULATION OF COMMONS AND WORKS ON COMMONS/(4) REGULATION BY COMMONS COUNCILS UNDER THE COMMONS ACT 2006/606. Consents required for carrying out of a commons council's functions.

606. Consents required for carrying out of a commons council's functions.

As from a day to be appointed by order made by the appropriate national authority¹, the following provisions have effect.

A commons council² does not need the consent of a person who has a right of common³ over the land⁴ for which it is established in order to do anything on the land⁵. Nor does it need the consent of any other person with an interest in the land⁶ for which it is established in order to do anything on the land where what is proposed to be done could be done without that person's consent by any person who has a right of common over the land⁷. Subject to that, nothing in Part 2 of the Commons Act 2006⁸ authorises a commons council to do anything on the land for which it is established without the consent of a person with an interest in the land, where that person's consent would otherwise be required⁹.

Where a commons council wishes to obtain the consent of any person with an interest in the land for which the council is established in respect of anything it proposes to do on the land, it may serve a notice on him¹⁰. Such a notice must specify:

- 450 (1) what the commons council proposes to do;
- 451 (2) the time within which the person on whom it is served may object, which may not be less than 28 days after service of the notice; and
- 452 (3) the manner in which he may object¹¹.

If the person on whom such a notice is served does not object within the time and in the manner specified in the notice, he is to be regarded as having given his consent in relation to the proposal specified in the notice¹².

Where a commons council proposes to serve a notice on a person under the above provisions¹³ but is unable after reasonable inquiry to ascertain his name or proper address:

- 453 (a) the council may post the notice on the land; and
- 454 (b) the notice is to be treated as having been served on the person at the time the notice is posted¹⁴.

An order establishing a commons council¹⁵ may make further provision as to the form and service of notices¹⁶ under the above provisions¹⁷.

At the date at which this volume states the law, however, the above provisions were not in force.

1 le as from a day to be appointed by order made by the appropriate national authority under the Commons Act 2006 s 56(1). At the date at which this volume states the law, no such day had been appointed. As to the meaning of 'appropriate national authority' see PARA 411 note 1.

2 As to the establishment, status and constitution of commons councils see PARAS 601-602.

3 As to the meaning of 'right of common' see PARA 405.

4 As to the meaning of 'land' see PARA 403 note 1.

5 Commons Act 2006 s 33(2) (not yet in force).

6 For these purposes, a person with an interest in any land is a person who (1) owns the land; or (2) is entitled to exercise any right over the land: Commons Act 2006 s 33(9) (not yet in force). As to the meaning of references to the ownership of land see PARA 430 note 5.

7 Commons Act 2006 s 33(3) (not yet in force).

8 Ie nothing in the Commons Act 2006 Pt 2 (ss 26-37) (not yet in force): see PARAS 601-605, 607.

9 Commons Act 2006 s 33(1) (not yet in force).

10 Commons Act 2006 s 33(4) (not yet in force).

11 Commons Act 2006 s 33(5) (not yet in force).

12 Commons Act 2006 s 33(6) (not yet in force).

13 Ie under the Commons Act 2006 s 33(4) (not yet in force): see the text and note 10.

14 Commons Act 2006 s 33(7) (not yet in force).

15 Ie an order under the Commons Act 2006 s 26 (not yet in force): see PARA 601.

16 Ie notices under the Commons Act 2006 s 33(4) (not yet in force): see the text and note 10.

17 Commons Act 2006 s 33(8) (not yet in force). Orders establishing individual commons councils are local in nature and are not recorded in this work.

UPDATE

601-607 Regulation by Commons Councils under the Commons Act 2006

These provisions in force as from 20 January 2010: SI 2010/61.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/6. REGULATION OF COMMONS AND WORKS ON COMMONS/(4) REGULATION BY COMMONS COUNCILS UNDER THE COMMONS ACT 2006/607. Enforcement of rules.

607. Enforcement of rules.

As from a day to be appointed by order made by the appropriate national authority¹, the following provisions have effect.

A person who breaches a rule which:

- 455 (1) is made with the consent of the appropriate national authority pursuant to a function of making rules conferred² on a commons council³; and
- 456 (2) specifies that a person who contravenes it is guilty of an offence under these provisions⁴,

is guilty of an offence⁵. A commons council may bring proceedings in relation to such an offence in respect of breach of any rule made by it to which heads (1) and (2) above apply⁶.

A commons council may apply to a county court for an order to secure compliance with any rule that it has made pursuant to a function of making rules conferred⁷ on it⁸; but it may only make such an application for the purpose of securing compliance with a rule to which heads (1) and (2) above apply if it is of the opinion that proceedings for an offence under the above provisions⁹ would provide an ineffectual remedy against the person who has failed to comply with the rule¹⁰. On such an application, the court may make such an order as it thinks fit¹¹.

At the date at which this volume states the law, however, the above provisions were not in force.

1 le as from a day to be appointed by order made by the appropriate national authority under the Commons Act 2006 s 56(1). At the date at which this volume states the law, no such day had been appointed. As to the meaning of 'appropriate national authority' see PARA 411 note 1.

2 le conferred under the Commons Act 2006 s 31 (not yet in force): see PARA 604.

3 As to the establishment, status and constitution of commons councils see PARAS 601-602.

4 le an offence under the Commons Act 2006 s 34 (not yet in force): see the text and note 5.

5 Commons Act 2006 s 34(1), (2) (not yet in force). A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 4 on the standard scale, and, in the case of a continuing offence, to a further fine not exceeding one half of level 1 on the standard scale for each day during which the offence continues after conviction: s 34(3) (not yet in force). As to the standard scale see PARA 421 note 3.

6 Commons Act 2006 s 34(4) (not yet in force).

7 See note 2.

8 Commons Act 2006 s 34(5) (not yet in force).

9 le an offence under the Commons Act 2006 s 34(1) (not yet in force): see the text and notes 2-5.

10 Commons Act 2006 s 34(6) (not yet in force).

11 Commons Act 2006 s 34(7) (not yet in force).

UPDATE

601-607 Regulation by Commons Councils under the Commons Act 2006

These provisions in force as from 20 January 2010: SI 2010/61.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/6. REGULATION OF COMMONS AND WORKS ON COMMONS/(5) REGULATION OF COMMONS UNDER LOCAL ACTS AND BYELAWS/608. Regulation under local Acts.

(5) REGULATION OF COMMONS UNDER LOCAL ACTS AND BYELAWS

608. Regulation under local Acts.

Various local Acts govern particular commons. Examples are Acts governing the New Forest¹, Epping Forest², the Malvern Hills³ and Dartmoor⁴. The Dartmoor Commons Act 1985, for instance, constitutes the Dartmoor Commoners' Council for the maintenance of and the promotion of proper standards of livestock husbandry on the commons in and about the Dartmoor National Park, regulates public access to the commons and confers powers on that council and on the County Council of Devon with reference to those commons⁵.

If it appears to the appropriate national authority⁶ desirable to do so in consequence of functions conferred on a commons council⁷ in relation to any land⁸, that authority may by order⁹ vary or revoke any local or personal Act, or any scheme or arrangement under such an Act, which relates to the management or maintenance of, or the exercise of rights of common¹⁰ over, the land¹¹. The appropriate national authority may not, however, so make provision to the extent that to do so would have the effect of abolishing or restricting a right of access of whatever nature exercisable by members of the public generally or by any section of the public¹².

1 Ie the New Forest Acts 1877 to 1970.

2 Ie the Epping Forest Acts 1878 and 1880.

3 Ie the Malvern Hills Acts 1884, 1909, 1924 and 1930.

4 See the Dartmoor Commons Act 1985.

5 See note 4.

6 As to the meaning of 'appropriate national authority' see PARA 411 note 1.

7 As to the establishment, status and constitution of commons councils see PARAS 601-602; and as to the functions that may be conferred on them see PARA 604.

8 As to the meaning of 'land' see PARA 403 note 1.

9 Ie by order under the Commons Act 2006 s 26: see PARA 601.

10 As to the meaning of 'rights of common' see PARA 405.

11 See the Commons Act 2006 s 36(1), (2)(e); and PARA 601 note 8.

12 Commons Act 2006 s 36(3). As to public rights of access see PARA 580 et seq; and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 501 et seq.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/6. REGULATION OF COMMONS AND WORKS ON COMMONS/(5) REGULATION OF COMMONS UNDER LOCAL ACTS AND BYELAWS/609. Regulation under miscellaneous byelaws.

609. Regulation under miscellaneous byelaws.

Various enactments, though not directed exclusively towards commons, confer powers of regulation and making byelaws which may affect common land. County, district and parish councils in England, county, county borough and community councils in Wales¹, the Common Council of the City of London², the London borough councils³, and National Park authorities⁴, may make byelaws for the regulation of any open space vested in the council or authority⁵. County and district councils in England, county and county borough councils in Wales⁶, National Park authorities, the Common Council of the City of London and the London borough councils may make byelaws for the purpose of providing or improving opportunities for the public enjoyment of common land⁷, and Natural England⁸ and the Countryside Council for Wales⁹ may make byelaws in respect of land which is being managed by them as a nature reserve¹⁰. Local planning authorities¹¹ may make byelaws as respects land in their area belonging to them and comprised either in a National Park or area of outstanding natural beauty, or as respects land or a waterway to which the public is given access by an agreement or order, or in consequence of acquisition¹². The Forestry Commissioners have powers to make byelaws for the purpose of regulating the use of any land under their control to which the public has access¹³. An access authority¹⁴ may make byelaws in respect of land in its area, including registered common land¹⁵, to which the public has access by virtue of the Countryside and Rights of Way Act 2000¹⁶.

1 The Open Spaces Act 1906 s 1, which defines 'local authority' for the purposes of that Act, refers to 'the council of any county, of any municipal borough, or of any district; the Common Council of the City of London; any parish council', but this should be read (in conjunction with the Parish Councils Act 1857 s 8(1), and the Local Government Act 1972 s 1(9), (10) (which abolished the municipal boroughs and their councils)) as referring to the authorities referred to in the text: see **LOCAL GOVERNMENT** vol 69 (2008) PARA 22 et seq.

2 As to the Common Council of the City of London see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARA 51 et seq.

3 As to the London boroughs and their councils see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARAS 5, 29-30, 35 et seq.

4 As to National Parks and National Park authorities see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 636 et seq; **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 526 et seq.

5 See the Open Spaces Act 1906 s 15 (amended by the London Government Act 1963 Sch 18 Pt II); the London Government Act 1963 s 58(1) (substituted by the Local Government, Planning and Land Act 1980 Sch 3 para 11; and amended by the Local Government Act 1985 Sch 17); the Environment Act 1995 s 70, Sch 9 para 2; and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 577. These powers do not, however, apply to any metropolitan common within the Metropolitan Commons Acts 1866 to 1898 (see **LONDON GOVERNMENT**): see the Open Spaces Act 1906 s 19(2) (added by SI 1965/654).

6 The Countryside Act 1968 s 6(2)(a) refers to 'the council of a county or county district' but in practice this is a reference to a county or district council in England and a county or county borough council in Wales: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq.

7 See the Countryside Act 1968 ss 6, 9, 41(1)(b) (s 6 amended by the Local Government Act 1972 Sch 30; the Local Government Act 1985 Sch 17; and the Environment Act 1995 Sch 24; the Countryside Act 1968 s 9 prospectively amended by the Commons Act 2006 Sch 5 para 1(1), (2), as from a day to be appointed under s 56(1)); and the Environment Act 1995 Sch 9 para 5(a), (b). See further PARA 580; and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 501 et seq. The functions of local authorities under the Countryside Act 1968 are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 Pt 1 (ss 1-21) (see s 4, Sch 3; and **LOCAL GOVERNMENT** vol 69 (2009) PARA 733); thus the Local Better Regulation Office may

give guidance to local authorities as to the exercise of those functions (see s 7; and **LOCAL GOVERNMENT** vol 69 (2009) PARA 734).

8 As to Natural England and the Countryside Council for Wales see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARAS 523, 524.

9 See note 8.

10 See the National Parks and Access to the Countryside Act 1949 s 20(1) (amended by the Natural Environment and Rural Communities Act 2006 Sch 11 Pt 1 para 15(d)); and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 672.

11 As to local planning authorities see **TOWN AND COUNTRY PLANNING** vol 46(1) (Reissue) PARA 28 et seq.

12 See the National Parks and Access to the Countryside Act 1949 s 90(1); and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 648.

13 See the Forestry Act 1967 s 46(1); and **FORESTRY** vol 52 (2009) PARA 41. These powers do not, however, apply to a common which is subject to a scheme or regulation made in pursuance of the Metropolitan Commons Acts 1866 to 1898 (see **LONDON GOVERNMENT**), or the Inclosure Acts 1845 to 1882 (ie principally the Commons Act 1876: see PARA 586 et seq) or the Commons Act 1899 (see PARA 590 et seq): Forestry Act 1967 s 46(3)(b). Powers to make byelaws have also been conferred on the Verderers of the New Forest: see the New Forest Act 1949.

14 As to the meaning of 'access authority' see PARA 584 note 8.

15 As to the registration of common land see PARA 506 et seq.

16 See the Countryside and Rights of Way Act 2000 s 17(1); PARA 584; and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 591.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/6. REGULATION OF COMMONS AND WORKS ON COMMONS/(6) MANAGEMENT SCHEMES FOR SITES OF SPECIAL SCIENTIFIC INTEREST/610. Management schemes for sites of special scientific interest; in general.

(6) MANAGEMENT SCHEMES FOR SITES OF SPECIAL SCIENTIFIC INTEREST

610. Management schemes for sites of special scientific interest; in general.

Much common land is subject to a notification¹ by Natural England or the Countryside Council for Wales² as a site of special scientific interest and is thus subject to controls on its use³. Natural England or the Countryside Council for Wales may formulate a management scheme for all or part of a site of special scientific interest⁴. A management scheme is a scheme for:

- 457 (1) conserving the flora, fauna, or geological or physiographical features by reason of which the land (or the part of it to which the scheme relates) is of special interest; or
- 458 (2) restoring them; or
- 459 (3) both⁵.

Natural England or the Countryside Council for Wales must serve notice of a proposed management scheme on every owner and occupier⁶ of any of the land, or the part of it to which the scheme would relate; but it may be served on them only after they have been consulted about the proposed management scheme⁷. The notice of a proposed management scheme must include a copy of the proposed scheme⁸ and must specify the time, not being less than three months from the date of the giving of the notice within which, and the manner in which, representations or objections with respect to the proposed management scheme may be made⁹. Natural England or the Countryside Council for Wales must consider any representation or objection duly made¹⁰. Where such a notice has been given, Natural England or the Countryside Council for Wales may, within the period of nine months beginning with the date on which the notice was served on the last of the relevant owners and occupiers¹¹, either:

- 460 (a) give notice to the relevant owners and occupiers withdrawing the notice; or
- 461 (b) give notice to them confirming the management scheme, with or without modifications¹²;

and if notice under head (b) above is given, the management scheme has effect from the time the notice is served on all of the relevant owners or occupiers¹³.

Natural England or the Countryside Council for Wales may at any time cancel or propose the modification of a management scheme¹⁴.

The provisions of a management scheme may be enforced by the service of management notices on owners or occupiers of land to which the scheme relates¹⁵. A person who without reasonable excuse fails to comply with a requirement of a management notice is guilty of an offence and is liable on summary conviction to a fine not exceeding the statutory maximum or on conviction on indictment to a fine¹⁶.

The notification and management of sites of special scientific interest is discussed in more detail elsewhere in this work¹⁷.

1 lie under the Wildlife and Countryside Act 1981 s 28: see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 674. For an example of the problems as to priority of grazing rights which may be caused when common land is notified as an SSSI see *Owen v Blathwayt*[2002] EWHC 2231 (Ch), [2003] 1 P & CR 444, [2002] All ER (D) 01 (Nov).

2 In relation to land in Wales, the Wildlife and Countryside Act 1968 ss 28-34 (which relate to sites of special scientific interest and limestone pavements: see the text and notes 3-16; and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 674 et seq) have effect as if references to Natural England were references to the Countryside Council for Wales: s 27AA (added by the Natural Environment and Rural Communities Act 2006 Sch 11 Pt 1 para 78). As to Natural England and the Countryside Council for Wales see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARAS 523, 524.

3 As to the duties of the owner or occupier of any land included in a site of special scientific interest see the Wildlife and Countryside Act 1981 s 28E; and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 679.

4 Wildlife and Countryside Act 1981 s 28J(1) (ss 28J-28P added by the Countryside and Rights of Way Act 2000 Sch 9 para 1; amended by the Natural Environment and Rural Communities Act 2006 Sch 11 Pt 1 para 79). The functions of local authorities under the Wildlife and Countryside Act 1981 are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 Pt 1 (ss 1-21) (see s 4, Sch 3; and **LOCAL GOVERNMENT** vol 69 (2009) PARA 733); thus the Local Better Regulation Office may give guidance to local authorities as to the exercise of those functions (see s 7; and **LOCAL GOVERNMENT** vol 69 (2009) PARA 734).

An agreement under the National Parks and Access to the Countryside Act 1949 s 16 (agreements for management of nature reserves in Wales: see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 671) or the Countryside Act 1968 s 15 (agreement with regard to sites of special scientific interest in Wales: see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 687) relating to a site of special scientific interest may provide for any matter for which a management scheme relating to that site provides (or could provide): Wildlife and Countryside Act 1981 s 28J(1), (13) (as so added).

5 Wildlife and Countryside Act 1981 s 28J(2) (as added: see note 4).

6 The notice may be served with the notification referred to in the Wildlife and Countryside Act 1981 s 28(1) (b) (see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 674) or afterwards: s 28J(4) (as added: see note 4). The owners and occupiers upon whom the notice must be served (referred to for these purposes as 'the relevant owners and occupiers') are (1) if it is served with the notification under s 28(1)(b), or later but before the notification referred to in s 28(5)(b) (see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 674), the owners and occupiers referred to in s 28(1)(b); (2) if it is served with the notification under s 28(5)(b) or later, the owners and occupiers of such of the land as remains subject to the notification: s 28J(5) (as so added).

For these purposes, 'occupier' includes (a) at the date at which this volume states the law, in relation to land in England and Wales which is common land, the commoners or any of them; and 'common land' means common land as defined in the Commons Registration Act 1965 s 22 (see PARA 407) and 'commoner' means a person with rights of common as defined in s 22 (see PARA 405); (b) as from a day to be appointed, in relation to land in England and Wales which is subject to rights of common within the meaning of the Commons Act 2006 (see PARA 405), the persons with such rights or any of them and any commons council established under the Commons Act 2006 Pt 2 (ss 26-37) (see PARA 601 et seq) for that land: Wildlife and Countryside Act 1981 s 52(2C) (added by the Countryside and Rights of Way Act 2000 Sch 9 para 5(1), (4); prospectively amended, so as to substitute for the wording set out in head (a) above the wording set out in head (b) above, by the Commons Act 2006 Sch 5 para 3, as from a day to be appointed under s 56(1); at the date at which this volume states the law, no such day had been appointed). As to the meaning of 'occupier' for these purposes see also *Southern Water Authority v Nature Conservancy Council*[1992] 3 All ER 481, [1992] 1 WLR 775, HL (a stranger who enters the land for a few weeks solely to do some work on it does not fall into the category of 'occupier').

7 Wildlife and Countryside Act 1981 s 28J(3) (as added and amended: see note 4). A notice under s 28J(3) ceases to have effect (1) on the giving of a notice of withdrawal under s 28J(8)(a) (see head (a) in the text); or (2) if not withdrawn or confirmed by notice under s 28J(8) within the period of nine months referred to there, at the end of that period: s 28J(9) (as so added).

8 Wildlife and Countryside Act 1981 s 28J(6) (as added: see note 4).

9 Wildlife and Countryside Act 1981 s 28J(7) (as added and amended: see note 4).

10 See note 9.

11 See note 6.

12 Natural England's or the Countryside Council for Wales's power under the Wildlife and Countryside Act 1981 s 28J(8)(b) (see head (b) in the text) to confirm a management scheme with modifications must not be exercised so as to make complying with it more onerous: s 28J(10) (as added and amended: see note 4).

13 Wildlife and Countryside Act 1981 s 28J(8) (as added and amended: see note 4).

14 Wildlife and Countryside Act 1981 s 28J(11) (as added and amended: see note 4). In relation to (1) the cancellation of a management scheme, s 28J(3)-(5) applies; and (2) a proposal to modify a management scheme, s 28J(3)-(10) applies, as it applies in relation to a proposal for a management scheme: s 28J(12) (as so added).

15 See the Wildlife and Countryside Act 1981 ss 28K, 28L (as added and amended: see note 4). See further **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARAS 688, 689.

16 Wildlife and Countryside Act 1981 s 28P(8) (as added: see note 4).

17 See **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 674 et seq.

UPDATE

610 Management schemes for sites of special scientific interest; in general

NOTE 2--For Wildlife and Countryside Act 1968 read Wildlife and Countryside Act 1981.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/6. REGULATION OF COMMONS AND WORKS ON COMMONS/(7) REGULATION OF WORKS ON COMMONS/611. Powers of appropriate national authority relating to unauthorised agricultural activities.

(7) REGULATION OF WORKS ON COMMONS

611. Powers of appropriate national authority relating to unauthorised agricultural activities.

Where it appears to the appropriate national authority¹ that:

- 462 (1) a person is carrying out, or causing to be carried out by virtue of any arrangements, an agricultural activity on land² which:
 - 31
 - 38. (a) is registered as common land³; or
 - 39. (b) is registered as a town or village green⁴ and is subject to rights of common⁵;
 - 32
 - 463 (2) the activity is unauthorised⁶; and
 - 464 (3) the activity is detrimental to:
 - 33
 - 40. (a) the interests of persons having rights in relation to, or occupying, the land; or
 - 41. (b) the public interest⁷,
 - 34

the appropriate national authority may, subject to the following provisions, serve a notice⁸ on the person requiring him to do any one or more of the following:

- 465 (i) within such reasonable period as may be specified in the notice to stop carrying out the activity, or stop causing it to be carried out, to the extent that it is unauthorised;
- 466 (ii) not to carry out, or cause to be carried out, any other unauthorised agricultural activity on the land which would be detrimental to the matters specified in head (3)(a) and (b) above;
- 467 (iii) to supply the authority with such information relating to agricultural activities on the land carried out, or caused to be carried out, by him as it may reasonably require⁹.

Before serving such a notice the appropriate national authority must, to the extent that it is appropriate and practicable in all the circumstances to do so, notify the following persons of its intention to serve the notice, namely:

- 468 (A) any commons council¹⁰ for the land;
- 469 (B) any other person with functions under any enactment which relate to the maintenance or management of the land; and
- 470 (C) any person appearing to the authority to own or occupy the land¹¹.

The appropriate national authority must also publicise its intention to serve the notice, in such manner as it thinks fit¹². Any such notification or publication may specify a period within which representations about the proposed notice may be made¹³.

In deciding whether to serve a notice under these provisions the appropriate national authority must have regard to any criminal or civil proceedings that have been or may be commenced in relation to the activity¹⁴ and to any steps taken by a commons council in relation to the activity¹⁵.

If a person on whom a notice is served under these provisions fails to comply with it, the appropriate national authority may apply to a county court for an order requiring him to do so¹⁶. The court may make such an order for the purpose of securing compliance with the notice as it thinks fit¹⁷.

1 As to the meaning of 'appropriate national authority' see PARA 411 note 1. Note, however, that at the date at which this title states the law, the Commons Act 2006 s 46 (see the text and notes 2-17) was not in force in relation to Wales.

2 As to the meaning of 'land' see PARA 403 note 1.

3 As to the meaning of 'land registered as common land' see PARA 424 note 7.

4 As to the meaning of 'land registered as a town or village green' see PARA 424 note 12. As to land which may be registered in England and Wales as a town or village green under the Commons Act 2006 see s 15; and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 541.

5 As to the meaning of 'right of common' see PARA 405.

6 For these purposes, activity is unauthorised if the person carrying it out or causing it to be carried out (1) has no right or entitlement by virtue of his ownership or occupation of the land, or pursuant to any right of common, to do so; or (2) is not doing so with the authority of the person or persons entitled to give such authority: Commons Act 2006 s 46(8). The power under s 46 'is intended as a power of last resort to deal with intractable problems that cannot be solved by other means': see 675 HL Official Report (5th series), 14 November 2005, col GC286, Baroness Farrington of Ribblesdale. As to the meaning of references to the ownership of land see PARA 430 note 5.

7 The reference in the Commons Act 2006 s 46(1)(c)(ii) (see head (3)(b) in the text) to the public interest includes the public interest in (1) nature conservation; (2) the conservation of the landscape; (3) the protection of public rights of access to any area of land; and (4) the protection of archaeological remains and features of historic interest: s 46(9). As to the meaning of 'nature conservation' see PARA 547 note 5.

8 The notice may be served by delivering it to him, or by leaving it at his proper address, or by sending it by post to him at that address: Environment Act 1995 s 123(1) (s 123(1)-(5) applied by the Commons Act 2006 s 46(10)). Any such notice may (1) in the case of a body corporate, be served on the secretary or clerk of that body; (2) in the case of a partnership, be served on a partner or a person having the control or management of the partnership business: Environment Act 1995 s 123(2) (as so applied). For these purposes and for the purposes of the Interpretation Act 1978 s 7 (service of documents by post) in its application to these provisions, the proper address of any person on whom any such notice is to be served is his last known address, except that: (a) in the case of a body corporate or its secretary or clerk, it is the address of the registered or principal office of that body; (b) in the case of a partnership or person having the control or the management of the partnership business, is the principal office of the partnership; and for these purposes the principal office of a company registered outside the United Kingdom or of a partnership carrying on business outside the United Kingdom is its principal office within the United Kingdom: Environment Act 1995 s 123(3) (as so applied). If the person to be served with any such notice has specified an address in the United Kingdom other than his proper address within the meaning of s 123(3) as the one at which he or someone on his behalf will accept notices of the same description as that notice, that address is also to be treated for these purposes for the purposes of the Interpretation Act 1978 s 7 as his proper address: Environment Act 1995 s 123(4) (as so applied). Where any notice is required to be served on a person who is, or appears to be, in occupation of any premises then (i) if the name or address of such a person cannot after reasonable inquiry be ascertained; or (ii) if the premises appear to be or are unoccupied, that notice may be served either by leaving it in the hands of a person who is or appears to be resident or employed on the premises or by leaving it conspicuously affixed to some building or object on the premises: Environment Act 1995 s 123(5) (as so applied).

9 Commons Act 2006 s 46(1), (2).

10 As to the meaning of 'commons council' see PARA 602 note 1.

11 Commons Act 2006 s 46(3)(a), (4).

- 12 Commons Act 2006 s 46(3)(b).
- 13 Commons Act 2006 s 46(5).
- 14 Commons Act 2006 s 46(6)(a).
- 15 Commons Act 2006 s 46(6)(b).
- 16 Commons Act 2006 s 46(7)(a).
- 17 Commons Act 2006 s 46(7)(b).

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/6. REGULATION OF COMMONS AND WORKS ON COMMONS/(7) REGULATION OF WORKS ON COMMONS/612. Prohibition on works without consent.

612. Prohibition on works without consent.

A person may not, except with the consent of the appropriate national authority¹, carry out any restricted works on land² to which the following provisions apply³, namely on:

- 471 (1) any land registered as common land⁴;
- 472 (2) land not so registered which is:
- 35 42. (a) regulated by an Act made under the Commons Act 1876 confirming a provisional order of the Inclosure Commissioners⁵; or
- 43. (b) subject to a scheme under the Metropolitan Commons Act 1866⁶ or the Commons Act 1899⁷;
- 36 473 (3) land not falling within head (1) or head (2) above which is in the New Forest and is subject to rights of common⁸.

For these purposes, 'restricted works' are:

- 474 (i) works which have the effect of preventing or impeding access to or over any land to which these provisions apply⁹, including in particular:
- 37 44. (A) the erection of fencing;
- 45. (B) the construction of buildings and other structures;
- 46. (C) the digging of ditches and trenches and the building of embankments¹⁰;
- 38 475 (ii) works for the resurfacing of land¹¹.

The above prohibition¹² does not, however, apply to:

- 476 (aa) works on any land where those works, or works of a description which includes those works, are carried out under a power conferred in relation to that particular land by or under any enactment¹³;
- 477 (bb) works on any land where the works are carried out under a power conferred by or under any enactment applying to common land¹⁴;
- 478 (cc) works authorised under a scheme under the Metropolitan Commons Act 1866 or the Commons Act 1899 without any requirement for any person to consent to the works¹⁵;
- 479 (dd) works for the installation of electronic communications apparatus for the purposes of an electronic communications code network¹⁶.

Nor does it apply in relation to National Trust land to which certain statutory powers to carry out works¹⁷ apply¹⁸.

The appropriate national authority has power to grant exemptions from the above prohibition¹⁹.

1 Subject to the Commons Act 2006 ss 39-44 (see PARA 613 et seq), consent given to works under s 38(1) constitutes consent for the purposes of s 38(1) only: s 38(9) (not yet in force in relation to Wales). Such consent

does not, therefore, exempt the applicant from the need to obtain any other necessary consent to the works, such as the consent of the landowner, or planning permission. Nor, it seems, does it take away or cut down a right of action in trespass at common law by the owner of the land: see *Rabett v Poole* [2003] 3 EGLR 143, Bury St Edmunds County Court (a decision on ministerial consent under the Law of Property Act 1925 s 194 (repealed in relation to England: see note 8) for the erection of temporary movable electric fencing to protect a commoner's horse). As to the meaning of 'appropriate national authority' see PARA 411 note 1; as to the procedure for obtaining consent see PARA 613; and as to determining an application for consent see PARA 614.

2 As to the meaning of 'land' see PARA 403 note 1.

3 Commons Act 2006 s 38(1) (not yet in force in relation to Wales). The prohibition in s 38(1) does not apply to works carried out in connection with the taking or working of minerals if (1) the works were granted planning permission under any enactment before the commencement of s 38 (ie before 1 October 2007 in relation to England: see the Commons Act 2006 (Commencement No 3, Transitional Provisions and Savings) (England) Order 2007, SI 2007/2584, art 2(b)); (2) the works are carried out in accordance with that planning permission in the period allowed for the works to be carried out (subject to any extension of time granted before or after that commencement date): Commons Act 2006 Sch 4 para 7 (not yet in force in relation to Wales).

4 As to the meaning of 'land registered as common land' see PARA 424 note 7.

5 As to regulation under the Commons Act 1876 see PARAS 586-589; and as to the Inclosure Commissioners see PARA 423.

6 As to the Metropolitan Commons Act 1866 see **LONDON GOVERNMENT**.

7 As to schemes under the Commons Act 1899 see PARA 590 et seq.

8 Commons Act 2006 s 38(5) (not yet in force in relation to Wales). As to the meaning of 'rights of common' see PARA 405. Land in the New Forest is not subject to registration under the Commons Registration Act 1965 or the Commons Act 1965: see PARA 509.

The Commons Act 2006 Pt 4 (ss 38-44) (see the text and notes 1-7, 9-19; and PARA 613 et seq), replaces the Law of Property Act 1925 s 194, the main provision which previously controlled works on common land. Section 194 is repealed by the Commons Act 2006 Sch 6 Pt 2, but at the date at which this volume states the law, that repeal was not in force in relation to Wales, and the Law of Property Act 1925 s 194 continued to apply in relation to Wales.

9 Commons Act 2006 s 38(2)(a) (not yet in force in relation to Wales).

10 Commons Act 2006 s 38(3) (not yet in force in relation to Wales).

11 Commons Act 2006 s 38(2)(b) (not yet in force in relation to Wales). For the purposes of s 38(2)(b) (see head (ii) in the text), works are for the resurfacing of land if they consist of the laying of concrete, tarmacadam, coated roadstone or similar material on the land (but not if they consist only of the repair of an existing surface of the land made of such material): s 38(4) (not yet in force in relation to Wales).

12 Ie the prohibition in the Commons Act 2006 s 38(1): see the text and notes 1-3.

13 Commons Act 2006 s 38(6)(a) (not yet in force in relation to Wales). In s 38(6)(a) (see head (aa) in the text), the reference to an enactment does not include Pt 2 (ss 26-44) (see PARA 601 et seq): s 38(7) (not yet in force in relation to Wales). See also the Planning Act 2008 s 139(2) (not yet in force), which provides that for the purposes of the Commons Act 2006 s 38(6)(a), works carried out under a power conferred by an order granting development consent are not to be taken to be carried out under a power conferred by or under an enactment, except in a case to which s 131 (compulsory acquisition of common land etc; not yet in force) or s 132 (compulsory acquisition of rights over common land etc: not yet in force) applies.

14 Commons Act 2006 s 38(6)(b) (not yet in force in relation to Wales). For the purposes of s 38(6)(b) (see head (bb) in the text), an enactment applies to common land if it is expressed to apply (generally) to (1) registered common land; (2) common land; or (3) any common or commons, commonable land, land subject to inclosure under any enactment or other land of a similar description: s 38(8) (not yet in force in relation to Wales). As to the use of the terms 'inclose', 'inclosure' etc see PARA 418 note 2; and as to inclosure generally see PARA 418 et seq. For an example of such an enactment see the Highways Act 1980 s 82(4) (provision of cattle-grids); and **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 518.

15 Commons Act 2006 s 38(6)(c) (not yet in force in relation to Wales). As to works on land subject to such a scheme as is mentioned in head (cc) in the text see s 42; and PARA 616.

16 Commons Act 2006 s 38(6)(d) (not yet in force in relation to Wales).

17 le land to which the National Trust Act 1907 s 29 (see PARA 618) applies.

18 See the National Trust Act 1971 s 23(2C) (added by the Commons Act 2006 Sch 4 para 4(1), (3); not yet in force in relation to Wales).

19 See the Commons Act 2006 s 43; and PARA 617.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/6. REGULATION OF COMMONS AND WORKS ON COMMONS/(7) REGULATION OF WORKS ON COMMONS/613. Procedure for obtaining consent.

613. Procedure for obtaining consent.

Regulations¹ may make provision as to the procedure to be followed in the making and determination of applications for consent for the carrying out of restricted works² and applications for the variation or revocation of any modification or condition³ of such a consent⁴. Such regulations may in particular include provision:

- 480 (1) as to the steps to be taken by an applicant before submitting an application⁵;
- 481 (2) as to the form and content of an application⁶;
- 482 (3) as to the procedure to be followed in making an application⁷;
- 483 (4) as to the evidence to be supplied in support of an application⁸;
- 484 (5) as to the fees payable in relation to an application⁹;
- 485 (6) as to the steps to be taken by the appropriate national authority¹⁰ upon receipt of an application¹¹;
- 486 (7) for the appointment by the appropriate national authority of a person to discharge any, or all, of its functions in relation to the determination of an application¹²;
- 487 (8) for the making of representations or objections in relation to an application¹³;
- 488 (9) for the holding of a hearing or local inquiry in relation to an application¹⁴;
- 489 (10) for the publication of a determination of an application and the notification of interested persons¹⁵.

The Works on Common Land, etc (Procedure) (England) Regulations 2007¹⁶, which apply in relation to England only¹⁷, have been made in the exercise of the above powers¹⁸.

A national authority¹⁹ may, for the purpose of securing that the above provisions apply to an application for consent under the legislation referred to in head (a) or head (b) below as they apply to an application for consent to the carrying out of restricted works under the relevant provision of the Commons Act 2006²⁰, by order²¹ amend:

- 490 (a) any local or personal Act passed before 19 July 2006²² which contains provision for that authority to consent to works on land which is common land²³; and
- 491 (b) any Act made under the Commons Act 1876 confirming a provisional order of the Inclosure Commissioners²⁴ which contains provision for that authority to consent to works on land to which the Act applies²⁵.

1 As to the meaning of 'regulations' see PARA 602 note 7.

2 I.e applications under the Commons Act 2006 s 38(1): see PARA 612.

3 I.e applications under the Commons Act 2006 s 39(5): see PARA 614.

4 See the Commons Act 2006 s 40(1) (not fully in force in relation to Wales). The Commons Act 2006 Pt 4 (ss 38-44) (see the text and notes 1-3, 5-25; and PARAS 612, 614 et seq), replaces the Law of Property Act 1925 s 194, the main provision which previously controlled works on common land. Section 194 is repealed by the Commons Act 2006 Sch 6 Pt 2, but at the date at which this volume states the law, that repeal was not in force in relation to Wales, and the Law of Property Act 1925 s 194 continued to apply in relation to Wales.

5 Commons Act 2006 s 40(2)(a) (not fully in force in relation to Wales).

6 Commons Act 2006 s 40(2)(b) (not fully in force in relation to Wales). In relation to England, an application for consent under s 38(1) must be made in writing on a form provided by the Secretary of State, include the information specified in the form and be signed by the applicant or his representative: Works on Common Land, etc (Procedure) (England) Regulations 2007, SI 2007/2588, regs 2(1)(a), 5(1). Any requirement imposed by or under the 2007 Regulations for a person to send a notice or document to another person may, however, be met by means of an electronic communication if (1) it results in the information contained in that notice or document being available to the other person in a form similar to the form in which it would appear in a notice or document sent in printed form; and (2) the other person consents to the notice or document being sent to him by those means: reg 4. For these purposes, 'common land' means land of a type specified in the Commons Act 2006 s 38(5) (see PARA 612); and 'electronic communication' has the meaning given in the Electronic Communications Act 2000 s 15(1) (see **TELECOMMUNICATIONS AND BROADCASTING** vol 45(1) (2005 Reissue) PARA 616): Works on Common Land, etc (Procedure) (England) Regulations 2007, SI 2007/2588, reg 2(3).

7 Commons Act 2006 s 40(2)(c) (not fully in force in relation to Wales). In relation to England, not later than seven days after making an application for consent under s 38(1), an applicant must (1) publish a notice of application in a newspaper circulating in the area in which the works are proposed; (2) post a notice of application at the principal places of entry to (or, if there are no such places, at a conspicuous place on the boundary of) the common land on which the works are proposed; and (3) send a notice of application to (a) the owner of the land on which the works are proposed (if he is not the applicant); (b) any other person occupying the land; (c) if the land is registered common land, the occupier of any property shown in the register of common land as being property to which rights of common over the land are attached, and who the applicant believes to be exercising those rights or likely to be affected by the application; (d) any other person known to the applicant to be entitled to exercise rights of common over the land, and who the applicant believes to be exercising those rights or likely to be affected by the application; (e) the parish council (if any) for the area in which the works are proposed: Works on Common Land, etc (Procedure) (England) Regulations 2007, SI 2007/2588, regs 2(1)(a), 7(1). As to the contents of the notice see reg 7(2). The applicant must also send a notice of application to such other persons, or display a notice of application in such further places, as the determining authority may direct under reg 6(4) (see note 11): reg 7(3). The applicant must give notice to the determining authority when he has complied with reg 7(1)-(3): see reg 7(4). 'The determining authority' means (i) the Secretary of State, where he is exercising functions in relation to the determination of an application; or (ii) a person who is exercising functions in relation to the determination of such an application pursuant to an appointment under reg 3(1) (see note 12) (other than an inspector who is appointed to carry out a hearing, inquiry or site inspection but not to determine an application): reg 2(3). 'Inspector' means (A) where the Secretary of State is the determining authority, a person appointed by the Secretary of State to carry out a hearing, inquiry or site inspection; (B) where another person is the determining authority, the person who conducts a hearing, inquiry or site inspection: reg 2(3).

The applicant must also ensure that copies of the application and the accompanying documents are available for inspection at the address specified in the notice of application for that purpose, at the times and dates specified in the notice of application: reg 8(1). As to the inspection of documents, and the supply of copies, see further reg 8(2)-(5).

8 Commons Act 2006 s 40(2)(d) (not fully in force in relation to Wales). In relation to England, an application for consent under s 38(1) must be accompanied by (1) a map showing the common land on which the works are proposed to be carried out, with the boundary of the common land marked in green and the site of the proposed works marked in red; (2) if appropriate, a plan or drawing of the proposed works; and (3) if the land is registered common land, a copy of the relevant entry in the register of common land: Works on Common Land, etc (Procedure) (England) Regulations 2007, SI 2007/2588, regs 2(1)(a), 5(2).

9 Commons Act 2006 s 40(2)(e) (not fully in force in relation to Wales).

10 As to the meaning of 'appropriate national authority' see PARA 411 note 1.

11 Commons Act 2006 s 40(2)(f) (not fully in force in relation to Wales). In relation to England, as soon as practicable after receiving an application for consent under s 38(1), the determining authority must send an acknowledgement of receipt to the applicant: see the Works on Common Land, etc (Procedure) (England) Regulations 2007, SI 2007/2588, regs 2(1)(a), 6(1). The determining authority must, either when it receives the application or as soon as practicable after the expiry of the period allowed for making representations under reg 9 (see note 13), decide whether the application will be dealt with on the basis of written representations, at a hearing, or at a public inquiry, and must notify the applicant of that decision: reg 6(2). If the determining authority is the Secretary of State, and he decides that the application is to be dealt with at a hearing or a public inquiry, he must appoint an inspector to conduct any hearing or inquiry and provide a report and recommendation to the Secretary of State: reg 6(3). The determining authority may, either when it acknowledges receipt of the application or at any time subsequently, direct the applicant to (1) provide any information or documents omitted from the application; (2) provide any further information or documents necessary to enable the application to be determined; or (3) send a notice of application to persons specified in the direction, or post a notice of application in places specified in the direction, in addition to the requirements in reg 7(1) (see note 7) (reg 6(4)) and may specify a time for complying with any directions so given (reg 6(5)).

If the applicant fails to comply with reg 7 or reg 8 (see note 7), or with any directions given under reg 6, the determining authority may (a) treat the application as withdrawn; (b) give directions to the applicant to remedy the non-compliance (and, if appropriate, extend the period allowed for making representations); or (c) waive the non-compliance, if he is satisfied that it would be unreasonable to require compliance and no-one is likely to be prejudiced by the non-compliance: reg 6(6).

12 Commons Act 2006 s 40(2)(g) (not fully in force in relation to Wales). In relation to England, the Secretary of State may appoint a person to exercise any or all of his functions in relation to applications of all or any of the kinds referred to in the Works on Common Land, etc (Procedure) (England) Regulations 2007, SI 2007/2588, reg 2(1), (2) (ie applications under the Commons Act 2006 s 38(1) (see PARA 612) or s 39(5) (see PARA 614); certain applications with regard to a metropolitan common (see **LONDON GOVERNMENT**); and applications under the National Trust Act 1971 s 23(2) (see PARA 618) or the New Parishes Measure 1943 s 15 (see PARA 477)), or in relation to one or more particular applications of any of those kinds: Works on Common Land, etc (Procedure) (England) Regulations 2007, SI 2007/2588, reg 3(1). Such an appointment must be in writing: reg 3(2). The Secretary of State has power to revoke such an appointment: see reg 3(3), (4).

13 Commons Act 2006 s 40(2)(h) (not fully in force in relation to Wales). In relation to England, any person may send representations about the proposed works to the determining authority by the date specified in the notice of application: Works on Common Land, etc (Procedure) (England) Regulations 2007, SI 2007/2588, reg 9(1). Such representations must (1) state the name and address of the person making them, and the nature of his interest in the land or the proposed works (if any); (2) be made in writing and signed by the person making them; and (3) state the grounds on which they are made: reg 9(2). As soon as reasonably practicable after the expiry of the period allowed for making representations, the determining authority must either notify the applicant that no representations have been made, or send the applicant a copy of all the representations received: reg 9(3). Where the applicant has so received a copy of representations, he may reply to the determining authority within 21 days of such receipt, setting out his response to them: reg 9(4). Such a reply must be in writing, and signed by the applicant or his representative: reg 9(5). The requirements in reg 9(2), (5) for a document to be signed are satisfied, in the case of a document sent by means of an electronic communication in accordance with the 2007 Regulations, by the person who is required to sign the document typing his name or producing his signature by computer or other mechanical means: reg 9(6).

14 Commons Act 2006 s 40(2)(i) (not fully in force in relation to Wales). In relation to England, if the determining authority decides to hold a hearing or inquiry, it must ensure that a notice of hearing or inquiry is (1) published on an appropriate website, and in a newspaper circulating in the area in which the works are proposed; (2) sent to the applicant and to any person who has made representations in accordance with reg 9 (see note 13); and (3) if the determining authority considers it necessary, publicised by such other means or sent to such other persons as may be appropriate to bring the hearing or inquiry to the attention of persons likely to be affected by the works: Works on Common Land, etc (Procedure) (England) Regulations 2007, SI 2007/2588, reg 10(1). As to the contents of the notice see reg 10(2). The date fixed for the start of the hearing or inquiry must be not less than six weeks after reg 10(1) has been complied with: reg 10(3). Subject to regs 11(2)-(7), 12, 14, the procedure at a hearing or inquiry is to be determined by the inspector: reg 11(1). Any person interested in the subject-matter of a hearing or inquiry may appear at the hearing or inquiry in person or by a representative: reg 11(2). As to evidence see reg 11(3)-(6). The inspector may adjourn a hearing or inquiry: see reg 11(7). As to the procedure at hearings see further reg 12; and as to the procedure at inquiries see further reg 14. The inspector may hold a pre-inquiry meeting (see reg 13) and a site inspection (see reg 15).

Where the determining authority has notified the applicant that a hearing or inquiry is to be held in relation to an application for consent under the Commons Act 2006 s 38(1), it may at any time before the conclusion of the hearing or inquiry decide (a) to cancel the hearing or inquiry and determine the application by way of written representations; or (b) to hold a hearing instead of an inquiry, or vice versa: Works on Common Land, etc (Procedure) (England) Regulations 2007, SI 2007/2588, regs 2(1)(a), 16(1). The determining authority must consult the applicant before deciding to change the procedure for determining an application: reg 16(2).

15 Commons Act 2006 s 40(2)(j) (not fully in force in relation to Wales). See PARA 614 note 9.

16 Ie the Works on Common Land, etc (Procedure) (England) Regulations 2007, SI 2007/2588, which came into force on 1 October 2007: reg 1(1).

17 Works on Common Land, etc (Procedure) (England) Regulations 2007, SI 2007/2588, reg 1(2).

18 See notes 4-15.

19 For these purposes, 'national authority' means (1) the Secretary of State; and (2) the Welsh Ministers: see the Commons Act 2006 s 44(4) (not yet in force in relation to Wales). As to the Secretary of State and the Welsh Ministers see PARA 423.

20 Ie an application for consent under the Commons Act 2006 s 38(1): see PARA 612.

21 As to the making of orders generally see the Commons Act 2006 s 59.

22 Ie the date on which the Commons Act 2006 received royal assent.

23 For these purposes, 'common land' means (1) any land registered as common land; and (2) any land not so registered which is subject to a scheme under the Metropolitan Commons Act 1866 (see **LONDON GOVERNMENT**) or the Commons Act 1899 (see PARA 590 et seq): Commons Act 2006 s 44(4) (not yet in force in relation to Wales).

24 As to regulation under the Commons Act 1876 see PARA 586 et seq; and as to the Inclosure Commissioners and their successors see PARA 423.

25 Commons Act 2006 s 44(2), (3)(a) (not yet in force in relation to Wales).

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614. Determination of applications for consent.

In determining an application¹ for consent to the carrying out of restricted works² in relation to works on land³ to which the statutory prohibition⁴ applies⁵, the appropriate national authority⁶ must have regard to:

- 492 (1) the interests of persons having rights in relation to, or occupying, the land, and in particular persons exercising rights of common⁷ over it;
- 493 (2) the interests of the neighbourhood;
- 494 (3) the public interest⁸;
- 495 (4) any other matter considered to be relevant⁹.

Consent may be given¹⁰:

- 496 (a) in relation to all or part of the proposed works¹¹;
- 497 (b) subject to such modifications and conditions relating to the proposed works as the appropriate national authority thinks fit¹²;
- 498 (c) in relation to works which have been commenced or completed¹³.

In considering the effect in relation to any land of proposed works under these provisions, the appropriate national authority may consider that effect in conjunction with the effect in relation to that land of any other works for which consent has previously¹⁴ been given¹⁵.

Where the appropriate national authority imposes any modification or condition in relation to any consent given to the carrying out of restricted works¹⁶, it may, on the application¹⁷ of any person carrying out or proposing to carry out works in accordance with the consent, vary or revoke that modification or condition¹⁸.

A national authority¹⁹ may, for the purpose of securing that the above provisions apply to an application for consent under the legislation referred to in head (i) or head (ii) below as they apply to an application for consent to the carrying out of restricted works under the relevant provision of the Commons Act 2006²⁰, by order²¹ amend:

- 499 (i) any local or personal Act passed before 19 July 2006²² which contains provision for that authority to consent to works on land which is common land²³; and
- 500 (ii) any Act made under the Commons Act 1876 confirming a provisional order of the Inclosure Commissioners²⁴ which contains provision for that authority to consent to works on land to which the Act applies²⁵.

1 As to the procedure on such an application see PARA 613.

2 Ie an application for consent under the Commons Act 2006 s 38(1): see PARA 612.

3 As to the meaning of 'land' see PARA 403 note 1.

4 Ie the Commons Act 2006 s 38: see PARA 612.

5 As to the land to which the Commons Act 2006 s 38 applies see PARA 612.

6 As to the meaning of 'appropriate national authority' see PARA 411 note 1.

7 As to the meaning of 'rights of common' see PARA 405.

8 The reference in the Commons Act 2006 s 39(1)(c) (see head (3) in the text) to the public interest includes the public interest in (1) nature conservation; (2) the conservation of the landscape; (3) the protection of public rights of access to any area of land; and (4) the protection of archaeological remains and features of historic interest: s 39(2) (not yet in force in relation to Wales). As to the meaning of 'nature conservation' see PARA 547 note 5; as to public rights of access see PARA 580 et seq; and as to the protection of archaeological remains and features of historic interest see **NATIONAL CULTURAL HERITAGE**.

9 Commons Act 2006 s 39(1) (not yet in force in relation to Wales). The Commons Act 2006 Pt 4 (ss 38-44) (see the text and notes 1-8, 10-25; and PARAS 612-613, 615-617), replaces the Law of Property Act 1925 s 194, the main provision which previously controlled works on common land. Section 194 is repealed by the Commons Act 2006 Sch 6 Pt 2, but at the date at which this volume states the law, that repeal was not in force in relation to Wales, and the Law of Property Act 1925 s 194 continued to apply in relation to Wales.

In relation to England, as soon as practicable after considering (1) the application and all representations made in accordance with the Works on Common Land, etc (Procedure) (England) Regulations 2007, SI 2007/2588, reg 9 (see PARA 613 note 13); (2) any report by an inspector following a site inspection; and (3) where a hearing or inquiry has been held, either (a) the evidence presented at the hearing or inquiry (if the determination is being made by the inspector who heard the evidence); or (b) the report and recommendation of the inspector (if the determination is not being made by the inspector), the determining authority must determine whether or not to grant consent to the proposed works, and notify the applicant in writing of that decision: regs 2(1)(a), 17(1). The decision must state, with reasons, whether consent to the proposed works is (i) granted as sought in the application; (ii) granted only in part, or subject to modifications or conditions; or (iii) refused: reg 17(2). Where an inspector has produced a report following a hearing, inquiry or site inspection, the notification of the decision sent to the applicant must be accompanied by a copy of that report: reg 17(3). The determining authority must publish the decision, and the reasons for it, on an appropriate website: reg 17(4). As to the meanings of 'inspector' and 'the determining authority' see PARA 613 note 7.

10 Ie under the Commons Act 2006 s 38(1): see PARA 612.

11 Commons Act 2006 s 39(3)(a) (not yet in force in relation to Wales).

12 Commons Act 2006 s 39(3)(b) (not yet in force in relation to Wales).

13 Commons Act 2006 s 39(7) (not yet in force in relation to Wales). Any consent so given has effect from the time of commencement of the works: s 39(7).

14 Ie under the Commons Act 2006 s 38(1) (see PARA 612) or under the Law of Property Act 1925 s 194 (repealed in relation to England, and prospectively repealed in relation to Wales, by the Commons Act 2006 Sch 6 Pt 2).

15 Commons Act 2006 s 39(4) (not yet in force in relation to Wales).

16 Ie any consent given under the Commons Act 2006 s 38(1): see PARA 612.

17 Regulations may specify a time limit for the making of such applications: Commons Act 2006 s 39(6) (not fully in force in relation to Wales). As to the meaning of 'regulations' see PARA 602 note 7. In relation to England, where a consent imposes modifications or conditions, any application under s 39(5) for those modifications or conditions to be varied or revoked must be made within three months of the date on which the applicant is notified of the decision to grant consent: Works on Common Land, etc (Procedure) (England) Regulations 2007, SI 2007/2588, reg 18(1). The application must (1) be in writing; (2) identify the modification or condition which the applicant wishes to vary; (3) describe the variation sought, and give reasons for it; and (4) be signed by the applicant or his representative: reg 18(2). As to the use of electronic communications see PARA 613 note 6. On receiving such an application, the determining authority may (a) determine the application; or (b) give directions to the applicant to notify specified persons of the application, and allow them an opportunity to make representations before determining the application: reg 19(1).

18 Commons Act 2006 s 39(5) (not yet in force in relation to Wales). In relation to England, the determining authority must (1) notify the applicant in writing of its decision and the reasons for it; (2) publish the decision, and the reasons for it, on an appropriate website: Works on Common Land, etc (Procedure) (England) Regulations 2007, SI 2007/2588, reg 19(2).

19 As to the meaning of 'national authority' for these purposes see PARA 613 note 19.

20 Ie an application for consent under the Commons Act 2006 s 38(1): see PARA 612.

- 21 As to the making of orders generally see the Commons Act 2006 s 59.
- 22 ie the date on which the Commons Act 2006 received royal assent.
- 23 As to the meaning of 'common land' for these purposes see PARA 613 note 23.
- 24 As to regulation under the Commons Act 1876 see PARA 586 et seq; and as to the Inclosure Commissioners and their successors see PARA 423.
- 25 Commons Act 2006 s 44(2), (3)(a) (not yet in force in relation to Wales).

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/6. REGULATION OF COMMONS AND WORKS ON COMMONS/(7) REGULATION OF WORKS ON COMMONS/615. Enforcement of prohibition.

615. Enforcement of prohibition.

Where any works are carried out on land¹ to which the statutory prohibition on the carrying out of restricted works without consent² applies³, in contravention of that prohibition⁴, any person may apply to the county court in whose area the land is situated⁵. On such an application the court may make an order:

- 501 (1) in any case, for removal of the works and restoration of the land to the condition it was in before the works were carried out⁶;
- 502 (2) in a case where consent has been given⁷ but the works have not been carried out in accordance with any term of that consent, for the works to be carried out in such manner and subject to such conditions as the order may specify⁸.

A national authority⁹ may, for the purpose of securing that the above provisions apply to the carrying out of works in contravention of the legislation referred to in head (a) or head (b) below as they apply to works carried out in contravention of the prohibition on the carrying out of restricted works under the relevant provision of the Commons Act 2006¹⁰, by order¹¹ amend:

- 503 (a) any local or personal Act passed before 19 July 2006¹² which contains provision for that authority to consent to works on land which is common land¹³; and
- 504 (b) any Act made under the Commons Act 1876 confirming a provisional order of the Inclosure Commissioners¹⁴ which contains provision for that authority to consent to works on land to which the Act applies¹⁵.

1 As to the meaning of 'land' see PARA 403 note 1.

2 Ie the Commons Act 2006 s 38: see PARA 612.

3 As to the land to which the Commons Act 2006 s 38 applies see PARA 612.

4 Ie in contravention of the Commons Act 2006 s 38(1): see PARA 612.

5 Commons Act 2006 s 41(1) (not yet in force in relation to Wales). The Commons Act 2006 Pt 4 (ss 38-44) (see the text and notes 1-4, 6-15; and PARAS 612-614, 616-617), replaces the Law of Property Act 1925 s 194, the main provision which previously controlled works on common land. Section 194 is repealed by the Commons Act 2006 Sch 6 Pt 2, but at the date at which this volume states the law, that repeal was not in force in relation to Wales, and the Law of Property Act 1925 s 194 continued to apply in relation to Wales.

6 Commons Act 2006 s 41(2)(a) (not yet in force in relation to Wales).

7 Ie under the Commons Act 2006 s 38(1): see PARA 612.

8 Commons Act 2006 s 41(2)(b) (not yet in force in relation to Wales).

9 As to the meaning of 'national authority' for these purposes see PARA 613 note 19.

10 Ie in contravention of the Commons Act 2006 s 38(1): see PARA 612.

11 As to the making of orders generally see the Commons Act 2006 s 59.

12 Ie the date on which the Commons Act 2006 received royal assent.

- 13 As to the meaning of 'common land' for these purposes see PARA 613 note 23.
- 14 As to regulation under the Commons Act 1876 see PARA 586 et seq; and as to the Inclosure Commissioners and their successors see PARA 423.
- 15 Commons Act 2006 s 44(2), (3)(a) (not yet in force in relation to Wales).

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/6. REGULATION OF COMMONS AND WORKS ON COMMONS/(7) REGULATION OF WORKS ON COMMONS/616. Works carried out on land subject to a scheme under the Metropolitan Commons Act 1866 or the Commons Act 1899.

616. Works carried out on land subject to a scheme under the Metropolitan Commons Act 1866 or the Commons Act 1899.

The following provisions apply in relation to works on land¹ subject to a scheme² under the Metropolitan Commons Act 1866³ or the Commons Act 1899⁴ ('relevant land')⁵ where, by virtue of the statutory prohibition contained in the Commons Act 2006⁶, the works may not be carried out without the consent of the appropriate national authority⁷.

Where:

- 505 (1) any provision of the scheme referred to above would also prohibit the carrying out of the works; and
- 506 (2) the scheme does not allow for any person to consent to the works to be carried out,

the works do not contravene that provision if they are carried out with, and in accordance with the terms of, the consent of the appropriate national authority under the relevant provision of the Commons Act 2006⁸ and of any owner of the land⁹, if not the person carrying out the works¹⁰. Regulations¹¹ may make provision as to the procedure to be followed in obtaining the consent of an owner¹² and may include provision for the consent of an owner to be regarded as having been given where he has not objected within a period of time specified in the regulations¹³.

Where any provision of the scheme referred to above would also prohibit the carrying out of the works without the consent of the appropriate national authority:

- 507 (a) consent given under the relevant provision of the Commons Act 2006¹⁴ is to be regarded as consent given under the scheme; and
- 508 (b) consent may not be sought separately under the scheme¹⁵.

1 As to the meaning of 'land' see PARA 403 note 1.

2 I.e. a scheme in force at the commencement of the Commons Act 2006 s 42: s 42(2)(a), (b) (not yet in force in relation to Wales). Section 42 was brought into force in relation to England on 1 October 2007 (see the Commons Act 2006 (Commencement No 3, Transitional Provisions and Savings) (England) Order 2007, SI 2007/2584, art 2(b)) but was not fully in force in relation to Wales at the date at which this volume states the law.

3 As to the Metropolitan Commons Act 1866 see **LONDON GOVERNMENT**.

4 As to schemes under the Commons Act 1899 see PARA 590 et seq.

5 See the Commons Act 2006 s 42(2) (not yet in force in relation to Wales).

6 I.e. by virtue of the Commons Act 2006 s 38(1): see PARA 612.

7 Commons Act 2006 s 42(1) (not yet in force in relation to Wales). As to the meaning of 'appropriate national authority' see PARA 411 note 1. Section 42 clarifies the previous law whereby there was confusion as to how the controls contained in the scheme described in the text and the controls in the Law of Property Act 1925 s 194 (repealed in relation to England and prospectively repealed in relation to Wales by the Commons Act 2006 Sch 6 Pt 2) worked together: see the Explanatory Notes to the Commons Act 2006 paras 198, 199. The

Commons Act 2006 Pt 4 (ss 38-44) (see the text and notes 1-6, 7-15; and PARAS 612-615, 617), replaces the Law of Property Act 1925 s 194, the main provision which previously controlled works on common land. At the date which this volume states the law, however, s 194 continued to apply in relation to Wales.

- 8 Ie under the Commons Act 2006 s 38(1): see PARA 612.
- 9 As to the meaning of references to the owner of land see PARA 430 note 5.
- 10 Commons Act 2006 s 42(3) (not yet in force in relation to Wales).
- 11 As to the meaning of 'regulations' see PARA 602 note 7.
- 12 Ie under the Commons Act 2006 s 42(3).
- 13 Commons Act 2006 s 42(4) (not fully in force in relation to Wales).
- 14 See note 8.
- 15 Commons Act 2006 s 42(5) (not fully in force in relation to Wales).

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/6. REGULATION OF COMMONS AND WORKS ON COMMONS/(7) REGULATION OF WORKS ON COMMONS/617. Power to exempt works from statutory prohibition.

617. Power to exempt works from statutory prohibition.

The appropriate national authority¹ may by order² provide that the statutory prohibition on the carrying out of restricted works without consent³ is not to apply to:

- 509 (1) the carrying out by a specified⁴ person of specified works on specified land⁵;
or
- 510 (2) the carrying out by a specified person, or a person of a specified description⁶, of works of a specified description⁷ on any land⁸ or on land of a specified description⁹.

The appropriate national authority may only make:

- 511 (a) an order under head (1) above if it is satisfied that the works specified in the order are necessary or expedient for any of the purposes set out in heads (i) to (v) below¹⁰;
- 512 (b) under head (2) above if it is satisfied that works of the description specified in the order are likely to be necessary or expedient on any land, or on land of the description specified in the order, for any of the purposes set out in heads (i) to (v) below¹¹.

The purposes referred to in heads (a) and (b) above are:

- 513 (i) use of land by members of the public for the purposes of open-air recreation pursuant to any right of access¹²;
- 514 (ii) the exercise of rights of common¹³;
- 515 (iii) nature conservation¹⁴;
- 516 (iv) the protection of archaeological remains or features of historic interest¹⁵;
- 517 (v) the use of the land for sporting or recreational purposes¹⁶.

An order under these provisions may provide that the statutory prohibition on the carrying out of restricted works without consent¹⁷ is not to apply only if the works to which the order relates are carried out in accordance with the terms of the order¹⁸.

1 As to the meaning of 'appropriate national authority' see PARA 411 note 1.

2 As to the making of orders see generally the Commons Act 2006 s 59.

3 I.e. the Commons Act 2006 s 38: see PARA 612.

4 For these purposes, 'specified' means specified in an order under the Commons Act 2006 s 43: s 43(8) (not fully in force in relation to Wales).

5 Commons Act 2006 s 43(1)(a) (not fully in force in relation to Wales). As to the meaning of 'land' see PARA 403 note 1. The Commons Act 2006 Pt 4 (ss 38-44) (see the text and notes 1-4, 6-18; and PARAS 612-616), replaces the Law of Property Act 1925 s 194, the main provision which previously controlled works on common land. Section 194 is repealed by the Commons Act 2006 Sch 6 Pt 2, but at the date at which this volume states the law, that repeal was not in force in relation to Wales, and the Law of Property Act 1925 s 194 continued to apply in relation to Wales.

6 As to the specified persons and descriptions of persons by whom certain works in England may be carried out see note 9.

7 As to the specified descriptions of works that may be carried out in England see note 9.

8 Commons Act 2006 s 43(1)(b)(i) (not fully in force in relation to Wales).

9 Commons Act 2006 s 43(1)(b)(ii) (not fully in force in relation to Wales).

In relation to England, the following descriptions of works may be carried out on land registered as common land (Works on Common Land (Exemptions) (England) Order 2007, SI 2007/2587, art 2):

- 7 (1) the erection of temporary fencing (which may include electric fencing) for a period not exceeding six months, to enclose land for the purpose of restricting the movement of grazing animals which are on the land (a) in the exercise of a right of common to graze animals; or (b) in the interests of nature conservation, by (i) the owner of the land; (ii) any person entitled to exercise rights of common over the land; and (iii) any other person acting with the written consent of the owner of the land; but subject to certain specified restrictions (see the Works on Common Land (Exemptions) (England) Order 2007, SI 2007/2587, Sch 1, Table item 1);
- 8 (2) the erection of temporary fencing, for a period not exceeding three years if the fence is wholly on moorland or one year in any other case, to enclose land for the purpose of (a) carrying out work which facilitates the growth or restoration of vegetation for the benefit of the common land; or (b) protecting the vegetation during a period of such growth or restoration, in so far as such protection is necessary or expedient to enable the growth or restoration to occur, by (i) the owner of the land; (ii) any person entitled to exercise rights of common over the land; and (iii) any other person acting with the written consent of the owner of the land; but subject to certain specified restrictions (see the Works on Common Land (Exemptions) (England) Order 2007, SI 2007/2587, Sch 1, Table item 2);
- 9 (3) the erection of temporary fencing, for a period not exceeding five years, to enclose land in order to restrict access to it in the interests of nature conservation, where that is required under the terms of a written agreement relating to the management of the land, being (a) an agreement between the owner of the land and Natural England; or (b) an agreement between the owner of the land and the Secretary of State, entered into before 1 October 2007, by (i) the owner of the land; (ii) Natural England; (iii) any other person acting with the written consent of the owner of the land; but subject to certain specified restrictions (see the Works on Common Land (Exemptions) (England) Order 2007, SI 2007/2587, Sch 1, Table item 3);
- 10 (4) the installation of a row, not exceeding 200 metres in length, of obstacles (such as bollards or large stones) which, whether by themselves or together with any existing obstructions interrupting the row, are intended to prevent or restrict vehicular access to common land, where the owner reasonably considers that such access would interfere with or be detrimental to (a) the use of the land by members of the public for the purpose of open-air recreation pursuant to any right of access; (b) the exercise of rights of common; or (c) nature conservation, by (i) the owner of the land; and (ii) any other person acting with the written consent of the owner of the land; but subject to certain specified restrictions (see the Works on Common Land (Exemptions) (England) Order 2007, SI 2007/2587, Sch 1, Table item 4).

The exemption in art 2 does not apply unless, where any person or class of persons has a legal right of access to or across the land which the works are to enclose, or to which the works are otherwise to impede access, means of access are provided which enable that right to continue to be exercised: art 3. As to notice of carrying out exempt works see art 4, Sch 1. For these purposes, references to 'land registered as common land' are to be taken, until the commencement of the Commons Act 2006 s 1 (see PARA 526) in relation to the area in which any land in question is situated, as references to land so registered under the Commons Registration Act 1965 (see PARA 506 et seq): Works on Common Land (Exemptions) (England) Order 2007, SI 2007/2587, art 5(2). 'Moorland' means any area of land shown coloured pink in the three volumes of maps, each entitled 'Moorland Map of England 2006' and marked with the number of the volume, dated 13 February 2006, signed on behalf of the Secretary of State for Environment, Food and Rural Affairs and deposited at the offices of the Department for Environment, Food and Rural Affairs at Ergon House, Horseferry Road, London SW1P 2AL: Works on Common Land (Exemptions) (England) Order 2007, SI 2007/2587, art 5(1).

10 Commons Act 2006 s 43(2) (not fully in force in relation to Wales).

11 Commons Act 2006 s 43(3) (not fully in force in relation to Wales).

12 Commons Act 2006 s 43(4)(a) (not fully in force in relation to Wales). As to public rights of access see PARA 580 et seq; and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 501 et seq.

13 Commons Act 2006 s 43(4)(b) (not fully in force in relation to Wales). As to the meaning of 'rights of common' see PARA 405.

14 Commons Act 2006 s 43(4)(c) (not fully in force in relation to Wales). As to the meaning of 'nature conservation' see PARA 547 note 5.

15 Commons Act 2006 s 43(4)(d) (not fully in force in relation to Wales). As to the protection of archaeological remains or features of historic interest see **NATIONAL CULTURAL HERITAGE**.

16 Commons Act 2006 s 43(4)(d) (not fully in force in relation to Wales). As to the use of the land for sporting or recreational purposes see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 532 et seq; **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 578 et seq.

17 See note 3.

18 Commons Act 2006 s 43(7) (not fully in force in relation to Wales).

Where (1) any land was at any time before the commencement of s 43 land to which the Law of Property Act 1925 s 194 applied; but (2) at any such time s 194 ceased to apply to the land by virtue of s 194(3)(a), the appropriate national authority may by order provide that the Commons Act 2006 s 38 is not to apply to the carrying out of works, or works of a description specified in the order, on that land: s 43(5) (not fully in force in relation to Wales). Where any land is the subject of a resolution under the Law of Property Act 1925 s 194(3)(b) immediately before the commencement of the Commons Act 2006 s 43, the appropriate national authority may by order provide that s 38 is not to apply to the carrying out of works, or works of a description specified in the order, on that land: s 43(6) (not fully in force in relation to Wales). Section 43(7) applies to any order under s 43(5) or (6): see s 43(7) (not fully in force in relation to Wales). The Law of Property Act 1925 s 194 (restrictions on inclosure of commons) is repealed by the Commons Act 2006 Sch 6 Pt 2, but at the date at which this volume states the law, that repeal was not in force in relation to Wales.

Halsbury's Laws of England/COMMONS (VOLUME 13 (2009) 5TH EDITION)/6. REGULATION OF COMMONS AND WORKS ON COMMONS/(7) REGULATION OF WORKS ON COMMONS/618. Works on National Trust land.

618. Works on National Trust land.

The National Trust¹ has statutory powers to carry out certain works on any Trust property which is:

- 518 (1) any land registered as common land²;
- 519 (2) land not so registered which is:
39
- 47. (a) regulated by an Act made under the Commons Act 1876 confirming a provisional order of the Inclosure Commissioners³; or
- 48. (b) subject to a scheme under the Metropolitan Commons Act 1866⁴ or the Commons Act 1899⁵;
- 40
- 520 (3) land not falling within head (1) or head (2) above which is in the New Forest and is subject to rights of common⁶.

The National Trust may:

- 521 (i) plant, drain, level and otherwise improve and alter any part or parts of such property so far as it may deem necessary or desirable and it may make temporary enclosures for these purposes and for the purpose of protecting or renovating turf and for protecting trees and plantations⁷;
- 522 (ii) make and maintain roads, footpaths and ways over such property and make and maintain ornamental ponds and waters on such property⁸;
- 523 (iii) erect sheds on such property for tools and materials and may maintain and repair such sheds⁹;
- 524 (iv) set apart from time to time parts of such property upon which persons may play games or hold meetings or gatherings for athletic sports¹⁰.

Subject to that, the Trust must at all times keep such property unenclosed and unbuilt on as open spaces for the recreation and enjoyment of the public¹¹ and must by all lawful means prevent, resist and abate all enclosures and encroachments upon, and all attempts to enclose or encroach upon, such property or any part of it or to appropriate or use such property, or the soil, timber or roads of that property, or any part of it, for any purpose inconsistent with the relevant legislation¹².

In addition to the powers conferred by heads (i) to (iv) above, the National Trust also has power with respect to any Trust property to which those powers apply to do anything appearing to the National Trust to be desirable for the purpose of providing, or improving, opportunities for the enjoyment of the property by the public¹³, and in the interests of persons resorting thereto, and in particular:

- 525 (A) to provide or arrange for the provision of facilities and services for the enjoyment or convenience of the public, including meals and refreshments, parking places for vehicles, shelters and lavatory accommodation¹⁴;
- 526 (B) to erect buildings and carry out works¹⁵.

The erection of any building, other than a shed for tools and materials, or the construction of any other work, whereby access by the public to any such Trust property is prevented or impeded, is not lawful unless the consent of the Secretary of State or the Welsh Ministers¹⁶ is obtained¹⁷.

1 As to the National Trust see **NATIONAL CULTURAL HERITAGE** vol 77 (2010) PARA 979 et seq.

2 As to the registration of land as common land see PARA 506 et seq.

3 As to regulation under the Commons Act 1876 see PARA 586 et seq; and as to the Inclosure Commissioners see PARA 423.

4 As to the Metropolitan Commons Act 1866 see **LONDON GOVERNMENT**.

5 As to regulation under the Commons Act 1899 see PARA 590 et seq.

6 See the National Trust Act 1907 s 29(1), (2) (amended by the Commons Act 2006 Sch 4 para 3; at the date at which this volume states the law, that amendment was not in force in relation to Wales). Nothing in the Commons Act 2006 s 38 (see PARA 612) applies in relation to land to which the National Trust Act 1907 s 29 applies: National Trust Act 1971 s 23(2C) (s 23(2A)-(2C) added by the Commons Act 2006 Sch 4 para 4(1), (3) (not yet in force in relation to Wales)).

7 National Trust Act 1907 s 29(1)(B) (as amended: see note 6).

8 National Trust Act 1907 s 29(1)(C) (as amended: see note 6).

9 National Trust Act 1907 s 29(1)(D) (as amended: see note 6).

10 National Trust Act 1907 s 29(1)(F) (as amended: see note 6).

11 National Trust Act 1907 s 29(1)(A) (as amended: see note 6). Notwithstanding this duty, however, the National Trust may erect fences, walls or similar works on such land, whether or not they enclose the land, in the exercise of its powers under the National Trust Act 1971 s 23 (see the text and notes 13-18): *National Trust for Places of Historic Interest or National Beauty v Ashbrook* [1997] 4 All ER 76, [1997] 30 LS Gaz R 29.

12 National Trust Act 1907 s 29(1)(E) (as amended: see note 6).

13 As to the exercise of these powers see *National Trust for Places of Historic Interest or National Beauty v Ashbrook* [1997] 4 All ER 76, [1997] 30 LS Gaz R 29, cited in note 11.

14 National Trust Act 1971 s 23(1)(a). Notwithstanding anything in the National Trust Act 1907 s 30(2) (power to charge for admission to Trust property: see **NATIONAL CULTURAL HERITAGE** vol 77 (2010) PARA 991), the National Trust may make such reasonable charges as they may from time to time determine for the use by the public of any facilities, services, parking places or other accommodation so provided: National Trust Act 1971 s 23(3).

15 National Trust Act 1971 s 23(1)(b).

16 As to the Secretary of State, and the transfer of functions in relation to Wales to the Welsh Ministers, see PARA 423.

17 National Trust Act 1971 s 23(2) (amended by the Commons Act 2006 Sch 4 para 4(1), (2); at the date at which this volume states the law, that amendment was not in force in relation to Wales). The Commons Act 2006 ss 39, 40 (see PARAS 613, 614) apply in relation to an application for consent under the National Trust Act 1971 s 23(2) as they apply in relation to an application for consent under the Commons Act 2006 s 38(1) (see PARA 612): National Trust Act 1971 s 23(2A) (as added (see note 6); not yet in force in relation to Wales). As to making such an application in relation to England see the Works on Common Land, etc (Procedure) (England) Regulations 2007, SI 2007/2588, reg 22.

The Commons Act 2006 s 41 (enforcement: see PARA 615) applies in relation to the carrying out of works in contravention of the National Trust Act 1971 s 23(2) as it applies to works carried out in contravention of the Commons Act 2006 s 38(1) and as if references to consent under s 38(1) were to consent under the National Trust Act 1971 s 23(2): s 23(2B) (as added (see note 6); not yet in force in relation to Wales).

---- End of Request ----

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